No. 87-1043-CFX
Status: GRANTED

Title: United States, Petitioner
v.
Ron Pair Enterprises, Inc.

Docketed:
December 21, 1987

Court: United States Court of Appeals
for the Sixth Circuit

Counsel for petitioner: Solicitor General, Stevenson,Jo Ann

Counsel for respondent: Traison,Michael H.

| Entry | Date | Note | Proceedings and Orders |
|---|---|---|---|
| 1 | Nov 23 1987 | | Application for extension of time to file petition and order granting same until December 24, 1987 (Scalia, November 24, 1987). |
| 2 | Dec 21 1987 | G | Petition for writ of certiorari filed. |
| 3 | Jan 27 1988 | | DISTRIBUTED. February 19, 1988 |
| 4 | Feb 9 1988 | F | Response requested -- TM. |
| 5 | Feb 29 1988 | | Brief of respondent Ron Pair Enterprises, Inc. in opposition filed. |
| 6 | Mar 2 1988 | | REDISTRIBUTED. March 18, 1988 |
| 7 | Mar 15 1988 | | First Circuit opinion submitted by Solicitor General and distributed to the Court. |
| 8 | Mar 21 1988 | | Petition GRANTED. |
| | | | ********** |
| 9 | Mar 31 1988 | G | Motion of the Solicitor General to dispense with printing the joint appendix filed. |
| 10 | Apr 18 1988 | | Motion of the Solicitor General to dispense with printing the joint appendix GRANTED. |
| 12 | May 5 1988 | | Order extending time to file brief of petitioner on the merits until June 4, 1988. |
| 13 | May 13 1988 | | Record filed. |
| | | * | Certified copy of original record, 2 volumes, received. |
| 14 | May 19 1988 | | Record filed. |
| | | * | Certified copy of C. A. proceedings received. |
| 15 | Jun 4 1988 | | Brief of petitioner United States filed. |
| 17 | Jun 23 1988 | | Order extending time to file brief of respondent on the merits until August 11, 1988. |
| 18 | Aug 10 1988 | | Brief of respondent Ron Pair Enterprises, Inc. filed. |
| 19 | Aug 11 1988 | | Brief amicus curiae of United Refining Company filed. |
| 20 | Aug 18 1988 | | CIRCULATED. |
| 21 | Aug 29 1988 | | Set for argument. Monday, October 31, 1988. (1st case)(1 hr). |
| 22 | Sep 8 1988 | G | Application (A88-194) to extend the time to file a reply brief from September 9, 1988 to September 16, 1988, submitted to Justice Scalia. |
| 24 | Sep 9 1988 | X | Reply brief of petitioner United States filed. |
| 23 | Sep 10 1988 | | Application (A88-194) granted by Justice Scalia extending the time to file until September 16, 1988. |
| 25 | Oct 31 1988 | | ARGUED. |

87 1043

No.

Supreme Court, U.S.
FILED
DEC 21 1987
JOSEPH F. SPANIOL, JR.
CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1987

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UNITED STATES OF AMERICA, PETITIONER

*v.*

RON PAIR ENTERPRISES, INC.

---

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

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48 pp

## QUESTION PRESENTED

Whether Section 506(b) of the Bankruptcy Code (11 U.S.C. (& Supp. IV)) entitles a creditor to receive post-petition interest on an oversecured claim allowed in a bankruptcy proceeding.

EDITOR'S NOTE

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# In the Supreme Court of the United States

OCTOBER TERM, 1987

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No.

UNITED STATES OF AMERICA, PETITIONER

*v.*

RON PAIR ENTERPRISES, INC.

---

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

---

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

## OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-12a) is reported at 828 F.2d 367. The opinion of the district court (App., *infra*, 15a-16a) and the opinions of the bankruptcy court (App., *infra*, 17a-19a, 20a-25a) are not yet reported.

## JURISDICTION

The judgment of the court of appeals (App., *infra*, 13a-14a) was entered on September 4, 1987. On November 24, 1987, Justice Scalia extended the time for filing a petition for a writ of certiorari to and including December 24, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTE INVOLVED

Section 506 of the Bankruptcy Code (11 U.S.C. (& Supp. IV)) is set out in a statutory appendix (App., *infra*, 25a).

## STATEMENT

1. Section 506 of the Bankruptcy Code (11 U.S.C. (& Supp. IV)) concerns the treatment of secured claims in bankruptcy proceedings. Section 506 was enacted, together with the rest of the Bankruptcy Code, in the comprehensive overhauling of the bankruptcy laws accomplished by the Bankruptcy Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549. Section 506(b) addresses the situation of an "oversecured claim," i.e., the situation where the value of the security exceeds the amount of the allowed secured claim (and certain administrative costs of preserving or disposing of the property for the creditor's benefit). In the case of an oversecured claim, "there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose" (11 U.S.C. (Supp. IV) 506(b)).

2. On May 1, 1984, respondent petitioned the United States Bankruptcy Court for the Eastern District of Michigan for a reorganization under Chapter 11 of the Bankruptcy Code, 11 U.S.C. (& Supp. IV) 1101 *et seq.* The government filed a timely proof of claim for $53,278 in assessed and unpaid withholding and social security taxes, penalties, and interest that had accrued prior to the filing of the petition in bankruptcy. The claim was secured by tax liens on property owned by respondent for which notice had been properly filed. The parties stipulated that the value of the collateral securing the tax claim was sufficient to pay this claim, along with any post-petition interest that was due on the claim. App., *infra*, 2a.



On October 1, 1985, respondent filed its First Amended Plan of Reorganization. This plan provided for the payment of the government's claim, including the portion allocable to pre-petition interest, but it did not provide for the payment of post-petition interest on that claim. The government filed a timely objection to the plan, arguing, inter alia, that Section 506(b) entitled it to receive post-petition interest on its oversecured claim. App., *infra*, 2a.

3. On December 6, 1985, the bankruptcy court denied the government's objection and ordered that the plan, which had previously been confirmed (see App., *infra*, 20a-25a), could be completed without payment of post-petition interest to the government (*id.* at 17a-19a). The court relied upon several "pre-Code" court of appeals decisions decided under the prior statute (Bankruptcy Act of 1898, ch. 541, 30 Stat. 544), noting that it saw "no reason to deviate from the sound reasoning of the various Courts of Appeal [*sic*] that have already disposed of this issue" (App., *infra*, 18a). These cases had held that the Bankruptcy Act did not require the payment of post-petition interest on nonconsensual liens, i.e., liens that were not voluntarily established by the debtor, such as a federal tax lien. See, *e.g.*, *United States* v. *Harrington*, 269 F.2d 719, 724 (4th Cir. 1959).

The district court reversed (App., *infra*, 15a-16a). The court held that "the plain language of Section 506(b) entitles the United States to such post-petition interest" (App., *infra*, 16a). The court further stated that this interpretation had been upheld in *In re Best Repair Co.*, 789 F.2d 1080 (4th Cir. 1986), and *In re Colegrove*, 771 F.2d 119 (6th Cir. 1985) (App., *infra*, 16a).

4. The court of appeals reversed and reinstated the order of the bankruptcy court (App., *infra*, 1a-12a), holding that Section 506(b) does not require that post-petition interest be paid on oversecured claims founded upon nonconsensual liens. The court found that the

language of Section 506(b) was not so unambiguous as to preclude further inquiry (App., *infra*, 4a). Citing *Kelly* v. *Robinson*, No. 85-1033 (Nov. 12, 1986), and *Midlantic Nat'l Bank* v. *New Jersey Dep't of Envtl. Protection*, 474 U.S. 494 (1986), the court stated that the Bankruptcy Code provision should be interpreted with reference to pre-Code law "in order to better understand the context in which the provision was drafted and therefore the language itself" (App., *infra*, 4a-5a). In this case, the court explained, judicial decisions under the Bankruptcy Act had established the rule that post-petition interest was not available on nonconsensual liens because the creditor had not bargained for the security (*id.* at 5a-7a). The court concluded that, in the absence of any affirmative indication in the legislative history that Congress intended to depart from existing case law, Section 506(b) should be interpreted as "codif[ying] the pre-Code law on the issue of allowable post petition interest" (App., *infra*, 10a). The court acknowledged that its "interpretation results in a conflict with the Fourth Circuit and with many bankruptcy courts" (*ibid.* (footnote omitted)).[1]

## REASONS FOR GRANTING THE PETITION

The court of appeals has decided a significant bankruptcy law issue in a manner that directly conflicts with the decision of another court of appeals. Moreover, the court's decision is erroneous because it unjustifiably disregards the plain language of the governing statute, Section 506(b) of the Bankruptcy Code. The question presented is a frequently-recurring one that is of considerable administrative importance. Accordingly, it is appropriate for this Court to grant certiorari in order to eliminate the uncertainty and disparity in treatment in different circuits that has been created by the court of appeals' error.

[1] The Sixth Circuit disavowed as dicta its prior statement that Section 506(b) "provides for interest on all allowed secured claims where the value of the security is greater than the claim" (*In re Colegrove*, 771 F.2d at 122). App., *infra*, 4a n.2.



1. As the court of appeals frankly acknowledged (App., *infra*, 10a), its decision directly conflicts with *In re Best Repair Co.*, 789 F.2d 1080 (4th Cir. 1986). The facts in *Best Repair* were essentially indistinguishable from those of the instant case. The government filed a timely proof of claim in a Chapter 11 proceeding for delinquent taxes, and the debtor acknowledged its liability and the fact that the value of the property securing the federal tax claim exceeded the total amount claimed by the government. The government and the debtor disagreed, however, on whether Section 506(b) required the payment of post-petition interest to the government since the claim was oversecured. The debtor contended that the statute should be interpreted as a codification of pre-Code law by reading the statutory allowance of post-petition interest for oversecured claims as limited to interest "provided for under the agreement under which such claim arose" (§ 506(b)).[2] The Fourth Circuit, however, flatly rejected this contention.

The court in *Best Repair* held that the debtor's argument "strains the plain meaning of the language and grammar of the provision" (789 F.2d at 1082). The court explained that the phrase "interest on such claim" was set off—by

[2] As we have noted (page 3, *supra*), several court of appeals decisions under the old Bankruptcy Act had followed the rule that post-petition interest could be recovered on oversecured claims only where the liens were consensual, which would not include federal tax liens. See *In re Boston & Maine Corp.*, 719 F.2d 493 (1st Cir. 1983), cert. denied, 466 U.S. 938 (1984); *In re Kerber Packing Co.*, 276 F.2d 245 (7th Cir. 1960); *United States* v. *Mighell*, 273 F.2d 682 (10th Cir. 1959); *United States* v. *Bass*, 271 F.2d 129 (9th Cir. 1959); *United States* v. *Harrington*, *supra*.

both a comma and a connecting conjunction—from the later list of other items covered by an agreement between the parties. "The effect of this usage," the court continued, "is to make 'interest on such claim' a separate and distinct clause to which 'provided for under the agreement' does not apply" (*ibid.*). The court concluded that "the natural meaning of [Congress's] chosen words is to permit post-petition interest on nonconsensual oversecured claims" (*ibid.* (footnote omitted)). The court added that the legislative history provided "no reason to depart from the natural import of the language itself" (*ibid.*). Thus, the decision below and the decision in *Best Repair* are irreconcilable, and they will lead to disparate results in the Fourth and Sixth Circuits whenever the government holds an oversecured tax claim in a Chapter 11 proceeding.

In addition, as the court of appeals also acknowledged, the decision below conflicts with the decisions of "many bankruptcy courts" (App., *infra*, 10a (footnote omitted)).[3] This conflict is not restricted to tax lien cases. The opinion below does not suggest that the result turns on the fact that the claimant is the government or that the claim involved is for delinquent taxes. Rather, the court of appeals quite explicitly held that Section 506(b) should be read to embody pre-Code law and that post-petition interest cannot be collected on an oversecured claim unless the interest was "provided for under the agreement under which [the] claim arose" (§ 506(b)). Thus, the decision below also conflicts with the decisions of numerous bankruptcy courts

[3] Several bankruptcy courts have awarded post-petition interest on claims oversecured by tax liens, for both federal (see, *e.g.*, *In re Gilliland*, 67 Bankr. 410 (Bankr. N.D. Tex. 1986); *In re Hoffman*, 28 Bankr. 503, 508 (Bankr. D. Md. 1983)) and state and local taxes (see, *e.g.*, *In re Brandenburg*, 71 Bankr. 719 (Bankr. D.S.D. 1987); *In re Busone*, 71 Bankr. 201 (Bankr. E.D.N.Y. 1987); contra *In re Granite Lumber Co.*, 63 Bankr. 466 (Bankr. D. Mont. 1986); *In re Venable*, 48 Bankr. 853 (S.D.N.Y. 1985)).



that have permitted private nonconsensual lienholders, such as judgment lien creditors and mechanic's lien claimants, to collect post-petition interest under Section 506(b). See, *e.g.*, *In re Charter Co.*, 63 Bankr. 568 (Bankr. M.D. Fla. 1986); *In re Romano*, 51 Bankr. 813 (Bankr. M.D. Fla. 1985); *In re Morrissey*, 37 Bankr. 571 (Bankr. E.D. Va. 1984); *In re Bormes*, 14 Bankr. 895 (Bankr. D.S.D. 1981); see also *In re Loveridge Machine & Tool Co.*, 36 Bankr. 159, 162 (Bankr. Utah 1983); contra, *In re Dan-Ver Enterprises*, 67 Bankr. 951 (W.D. Pa. 1986).

2. a. The decision of the court of appeals mistakenly fails to apply the plain terms of the statute. The basic rule of statutory construction is that the plain meaning of a statute should be followed, except in the "rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters." *Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982). See also, *e.g.*, *United States* v. *Clark*, 454 U.S. 555, 560 (1982); *United States* v. *Turkette*, 452 U.S. 576, 580 (1981). This is not one of these rare cases. Rather, the court of appeals departed from the apparent meaning of the statutory language without any substantial basis for believing that the plain meaning did not reflect the intention of Congress.

The natural reading—indeed, the only facially plausible reading—of Section 506(b) is that it permits all holders of oversecured claims to collect post-petition interest and, in addition, reasonable fees and costs provided for in the agreement giving rise to the claim. The authorization to pay interest on the claim is designed to stand independently; it is separated from the remaining portion of the statute both by a comma and by the conjunctive phrase "and any," which introduces a second category of payments allowed to the holders of oversecured claims. The concluding phrase—"provided for under the agreement"—cannot plausibly be read as modifying anything more than

the immediately preceding list of payments, *i.e.*, "reasonable fees, costs, or charges." The court of appeals' proffered construction that the "provided for" phrase is a limitation on the interest award tortures the structure of the provision and amounts to an "effort to circumvent the plain meaning of the statute by creating an ambiguity where none exists" (*Escondido Mutual Water Co.* v. *La Jolla Band of Mission Indians*, 466 U.S. 765, 781 (1984)).

The fact that pre-Code decisional law had set forth a different rule from that indicated by the language of Section 506(b) provides no reason to question whether that language faithfully embodies congressional intent. The Bankruptcy Code was designed as a comprehensive revision of the substantive and procedural law governing bankruptcy proceedings. *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 52-53 (1982). Congress stated (H.R. Rep. 95-595, 95th Cong., 1st Sess. 3 (1977) (footnotes omitted)):

> The major purpose of this bill is the modernization of the bankruptcy law. The substantive law of bankruptcy and the current bankruptcy system was designed in 1898, in the horse and buggy era of consumer and commercial credit, and was last overhauled in 1938, nearly 40 years ago.

Extensive consideration was given both to tax collection in bankruptcy proceedings and to the treatment of secured claims. Since the motivation for the comprehensive bankruptcy reform was to *change* the law, there is no reason to assume that this major revision intended to retain decisional law under the old regime.

This is particularly true with respect to the oversecured claim issue presented here. One of Congress's goals in enacting the new Bankruptcy Code was to strike a balance between the competing interests of debtors, private creditors, and the government as a tax collector. See S.



Rep. 95-989, 95th Cong., 2d. Sess. 14 (1978); S. Rep. 95-1106, 95th Cong., 2d Sess. 2 (1978). Given the substantial changes in commercial lending practices following the adoption of the Uniform Commercial Code in the 1960s and the modernization of the treatment of federal tax liens in the Federal Tax Lien Act of 1966, Pub. L. No. 89-719, 80 Stat. 1125, Congress would have been expected to strike a different balance in the Bankruptcy Code from that found in Bankruptcy Act case law that antedated these changes.

Indeed, the changes wrought by the modernization of commercial practices have almost entirely eviscerated the reasons given by the court below, and by the earlier decisions that it followed, to justify a ban on payment of post-petition interest to the holders of nonconsensual oversecured claims. For example, one of the reasons given by the court of appeals for the rule it adopted is that the government should not be entitled to post-petition interest because a tax lien is a general lien that encumbers all property belonging to the taxpayer, while a private creditor's lien reaches only a single asset (App., *infra*, 7a). See also, *e.g.*, *In re Kerber Packing Co.*, 276 F.2d 245, 247 (7th Cir. 1960); *United States* v. *Bass*, 271 F.2d 129, 131-132 (9th Cir. 1959). While this distinction might have been valid when it was first suggested, under modern commercial lending practices it is no longer the case that private lienholders limit their security to a single asset. See, *e.g.*, *United States* v. *Security Indus. Bank*, 459 U.S. 70, 71 (1982); *In re American Mariner Indus., Inc.*, 734 F.2d 426, 427 (9th Cir. 1984) (bank loan secured by security interest in "basically all of the [debtor's] assets").

The court's other rationale for its rule—that allowing interest to the holders of oversecured claims unfairly disadvantages general unsecured creditors who have no power to compel the debtor to pay its taxes in a timely fashion (see App., *infra*, 7a n.6; *In re Boston & Maine Corp.*, 719 F.2d 493, 497 (1st Cir. 1983), cert. denied, 466 U.S. 938

(1984))—has similarly been weakened by more recent developments. The government now must file notice of its tax lien in order to become a secured creditor, and unsecured creditors have the opportunity to discover the tax liens and to choose to withhold credit if they cannot obtain adequate security. The government, on the other hand, is an "involuntary creditor" that lacks the ability easily to enforce collection or to prevent further extensions of "credit" in the form of additional unpaid withholding taxes. See generally H.R. Rep. 95-595, 95th Cong., 1st Sess. 189-193 (1977); *id.* at 193 ("it is a frequent occurrence that the business will stop paying its taxes before it stops paying its other creditors because the officers of a business know that detection of nonpayment is more difficult for the taxing authority than it is for the supplier or lender, and that an unpaid supplier quickly stops shipping goods, though an unpaid taxing authority is usually unable to take collection action for months").

In sum, no rational congressional purpose would be served by reading Section 506(b) to embody pre-Code law, in defiance of its plain meaning.

b. The court of appeals relied on no legislative history or other evidence that would even suggest that the plain meaning of Section 506(b) does not reflect the intent of Congress, much less evidence that would show that this is one of of those "rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters" (*Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. at 571). Instead, the court relied on two recent decisions of this Court for what it viewed as a general rule of construction—namely, that a provision of the Bankruptcy Code should be assumed to embody pre-Code decisional law in the absence of a very explicit indication by Congress of an intent to abandon that prior decisional law. The court erred both in deducing such a general rule of construction from these cases and in



applying it here. Both of the cases relied upon concerned the effect of a general bankruptcy provision on important issues and policies outside the bankruptcy context. Because it appeared likely that Congress had not considered these nonbankruptcy issues in the bankruptcy revision, it was not unreasonable for the Court to look to pre-Code law, among other things, in an attempt to divine congressional intent. But those cases have little bearing here where the Bankruptcy Code provision is specifically addressed to the issue at hand, and that issue is a core bankruptcy matter. In short, there is simply no basis for concluding that pre-Code decisional law is embodied in Section 506(b).

In *Midlantic Nat'l Bank* v. *New Jersey Dep't of Envtl. Protection*, 474 U.S. 494 (1986), the Court held that the Bankruptcy Code's provision generally authorizing the trustee to abandon property (11 U.S.C. (Supp. IV) 554(a)), did not give him the right to abandon property in contravention of state or local laws designed to protect public health or safety. The Court explained that "[n]either the Court nor Congress has granted a trustee in bankruptcy powers that would lend support to a right to abandon property in contravention of state or local laws designed to protect public health or safety" (474 U.S. at 502). Indeed, the Court stated, Congress has "repeatedly expressed its legislative determination that the trustee is not to have *carte blanche* to ignore nonbankruptcy law," especially when issues of public health and safety are involved (*ibid.*). The Court also stated that there had been well-recognized restrictions on the trustee's abandonment power when Congress enacted Section 554(a) (474 U.S. at 500-501). Characterizing Section 554 as a "codif[ication of] the judicially developed rule of abandonment," the Court further stated that it was a normal rule of statutory construction, particularly in bankruptcy codifications, that Congress makes its intent specific if it intends to

change the interpretation of a judicially created concept (474 U.S. at 501). Finding that the exemption from state law sought by the trustee was an "extraordinary" one (*ibid.*), the Court concluded that an intent to establish such an exemption would have been expressly manifested by Congress.

In *Kelly* v. *Robinson*, No. 85-1033 (Nov. 12, 1986), the Court held that the Bankruptcy Code did not provide for the discharge of restitution obligations to crime victims ordered by the state's criminal justice system. Citing *Midlantic*, the Court noted that the 1978 Code provision, which did not on its face make such obligations non-dischargeable, was enacted "against the background of an established judicial exception to discharge for criminal sentences, including restitution orders" (slip op. 9-10). The Court explained that this judicial exception had been established in the face of relatively "clear statutory language" (*id.* at 8) that would have rendered such debts dischargeable, and therefore it was reasonable to read the 1978 statute as embodying the same exception, rather than silently clashing with the "deep conviction that federal bankruptcy courts should not invalidate the results of state criminal proceedings" (*id.* at 10).

The Court did not purport in these cases to establish a general rule that the Bankruptcy Code necessarily must be construed to preserve pre-Code judicial rules in the absence of a specific statement of contrary congressional intent. Indeed, that proposition cannot be squared with this Court's decision in *United States* v. *Whiting Pools, Inc.*, 462 U.S. 198 (1983). The Court there held that, with respect to property seized by levy to satisfy a federal tax lien, the government, just like other secured creditors, is subject to the general requirement of 11 U.S.C. 542(a) that it turn over secured property to the bankruptcy trustee. The Court recognized (*Phelps* v. *United States*, 421 U.S. 330 (1975)) that pre-Code law had held that property



seized by the IRS pursuant to a levy was not subject to the bankruptcy court's jurisdiction (see 462 U.S. at 206 n.13). But the Court in *Whiting Pools* held that this previously-established limitation was now "irrelevant because of the expanded jurisdiction of bankruptcy courts under the Bankruptcy Code" (*id.* at 210 n.18). The Court explained that "[t]he Service is bound by § 542(a) to the same extent as any other secured creditor" and that "[n]othing in the Bankruptcy Code or its legislative history indicates that Congress intended a special exception for the tax collector in the form of an exclusion from the estate of property seized to satisfy a tax lien" (462 U.S. at 209). By the same token, however, nothing in the Bankruptcy Code or the legislative history had indicated an intent to overrule *Phelps*. The Court thus rejected the premise that pre-Code judicial law is assumed to have been embodied in the Bankruptcy Code in the absence of a specific contrary statement by Congress.

In sum, *Midlantic* and *Kelly* do not establish any general presumption that the Bankruptcy Code embodies pre-Code judicial law; rather, they simply hold that pre-Code law was relevant in the circumstances of those cases. This case, however, differs from *Midlantic* and *Kelly* in several important respects. Those cases involved the effect of a fairly general bankruptcy law provision upon a question implicating important governmental interests unrelated to bankruptcy—state health and safety laws and the continued effectiveness of requirements imposed in state criminal proceedings—that were not the focus of congressional attention during the drafting of the Bankruptcy Code. The issue here, by contrast, relates only to a core matter of bankruptcy – the extent of distributions to secured creditors in bankruptcy proceedings (see 28 U.S.C. (Supp. III) 157(b)(2)(B)). The resolution of this issue depends upon the balance struck among the interests of competing creditors in bankruptcy proceedings, which

was one of the principal issues considered by Congress in 1978.[4] Moreover, the statute here is specifically directed at the question of recovery of post-petition items arising from oversecured claims. In contrast to *Midlantic* and *Kelly*, the rule adopted by the court of appeals cannot be regarded as remedying what may have been a minor oversight in the statute on an issue upon which Congress did not focus its attention; rather, the court of appeals' decision is directly antithetical to what Congress explicitly said about an issue that was the very subject of the relevant provision.

Thus, the exceptional circumstances that induced the Court to depart in *Midlantic* and *Kelly* from what the statute standing alone appeared to suggest are absent here. Rather, as in *Whiting Pools*, the language of the new statute should be construed in accordance with normal rules of statutory construction, not by adopting decisional law developed under the old statute. Congress here enacted a major change in the bankruptcy laws and specifically addressed a particular issue in broad language that covers the government's tax claim. There is no suggestion in the legislative history that the federal government (or other nonconsensual lienholders) should be excepted from the statute. Accordingly, there are no exceptional circumstances present that could justify departing from the plain meaning of the statute — the specific terms of

[4] The House Report on the 1978 Act noted in its overview of the bill (H.R. Rep. 95-595, 95th Cong., 1st Sess. 4-5 (1977) (footnote omitted)):

> This is not primarily a debtor's bill * * *. The bill codifies creditors' rights more clearly than the case law, which is in many ways just developing. It defines the protections to which a secured creditor is entitled, and the means through which the court may grant that protection.



which clearly indicate that Congress did not intend to retain pre-Code decisional law on the question at issue.[5]

3. The conflict in the circuits created by the decision below warrants this Court's attention because the question presented is one of considerable importance to the administration of the bankruptcy laws. Most bankruptcies involve secured claims, often including claims in which the value of the security exceeds the amount of the claim. The Internal Revenue Service's statistics show that, during the 1982-1986 period, the IRS filed secured claims in bankruptcy proceedings totalling more than $730 million, including $186 million in 1986 alone. While the figures do not indicate the precise amount of these claims that were oversecured, the number is plainly substantial. Moreover, the issue presented here affects not only oversecured claims filed by the federal government, but also those filed by state and local governments and by private creditors whose liens are nonconsensual. Clearly, a uniform nationwide rule is required on an issue that recurs so frequently, and the Court therefore should act to resolve the conflict in the circuits.

[5] Indeed, even under the court of appeals' reading, Section 506(b) cannot be said to embody pre-Code law. Under prior law, the question whether attorney's fees provided for in the agreement would be allowed was governed by state law. Section 506(b), however, does not include this state law requirement. See *Unsecured Creditors' Comm.* v. *Walter E. Heller & Co.*, 768 F.2d 580, 582-585 (4th Cir. 1985).

## CONCLUSION

The petition for a writ of certiorari should be granted.
Respectfully submitted.

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DECEMBER 1987

## APPENDIX A

# UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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No. 86-1785

IN RE: RON PAIR ENTERPRISES, INC., DEBTOR

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UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

*v.*

RON PAIR ENTERPRISES, INC. d/b/a MIDWEST INTERNATIONAL ENVIRONMENTAL DIVISION AND d/b/a INDUSTRIAL ENVIRONMENTAL SUPPLY COMPANY, DEFENDANT-APPELLANT

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On Appeal from the United States District Court for the Eastern District of Michigan

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Decided and Filed September 4, 1987

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Before: KENNEDY and MILBURN, Circuit Judges; and CONTIE, Senior Circuit Judge.

CONTIE, Senior Circuit Judge.

Debtor Ron Pair Enterprises, Inc. appeals from the district court's order awarding postpetition interest on an oversecured prepetition federal tax lien. The district court, in reversing the bankruptcy court's ruling, held that section 506(b) of the 1978 Bankruptcy Code, 11 U.S.C. § 506(b), provides for the payment of such interest by its plain terms. We conclude that the language of section 506(b) does not clearly provide for the payment of such interest and, in fact, it fails to explicitly overrule the pre-

Code judicially created concept disallowing the payment of postpetition interest on nonconsensual prepetition oversecured claims. We therefore reverse the judgment of the district court.

I.

Debtor filed a bankruptcy petition pursuant to Chapter 11 of the Bankruptcy Code on May 1, 1984, in the United States Bankruptcy Court for the Eastern District of Michigan. The Government filed timely proof of a prepetition claim in the amount of $53,277.93, comprised of assessments for unpaid withholding and social security taxes, penalties and prepetition interest. The Government's claim was properly perfected through a tax lien.

Debtor's First Amended Plan of Reorganization was filed on October 1, 1985. The Plan provided for the payment of the Government's prepetition tax claim, including prepetition interest which had accrued on that claim, but it did not provide for the payment of postpetition interest on that claim. Accordingly, the Government filed a timely objection to the Plan claiming, among other things, that section 506(b) of the 1978 Bankruptcy Code allows for the payment of postpetition interest since the assets securing the Government's claim exceeded the amount of the principal debt.[1] A hearing was held before the Bankruptcy Court on December 3, 1985, at which time the parties stipulated that the collateral securing the Government's claim was adequate to pay that claim as well as postpetition interest on that claim; in other words, they stipulated that the claim was oversecured.

[1] There is no indication in the record regarding which portions of Debtor's estate the Government's tax lien attaches, nor the value of specific pieces of property or the claims made on those pieces of property. However, it is not uncommon for tax liens to attach to all parcels of real estate owned by a debtor.



On December 6, 1985, the Bankruptcy Court denied the Government's objection, concluding that section 506(b) did not authorize the payment of postpetition interest on the Government's prepetition tax claim. The district court reversed the Bankruptcy Court's judgment on June 30, 1986, concluding that the "plain language" of section 506(b) entitled the Government to such interest, relying on the Fourth Circuit's decision in *In re Best Repair Co.*, 789 F.2d 1080 (4th Cir. 1986), and this court's decision in *In re Colegrove*, 771 F.2d 119 (6th Cir. 1985). This timely appeal followed.

II.

The sole issue before this court is whether section 506(b) of the 1978 Bankruptcy Code, 11 U.S.C.§ 506(b), authorizes the payment of postpetition interest on an oversecured prepetition claim when that claim is nonconsensual in nature. Section 506(b) provides in full:

> To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges *provided for under the agreement under which such claim arose.*

(Emphasis added). Debtor argues that the emphasized clause above modifies both "interest on such claim" as well as "any reasonable fees, costs, or charges," thereby codifying the judicially created pre-Code rule regarding postpetition interest on oversecured prepetition claims. Debtor asserts that there is no indication that Congress intended to deviate from the judicially created rule that postpetition interest could not be awarded on nonconsensual prepetition claims, arguing that the language in section 506(b) is

too ambiguous to be considered an explicit departure from a well-established doctrine.

The Government counters by arguing that the language of section 506(b) is unambiguous in that the emphasized clause above only modifies "any reasonable fees, costs, or charges." The Government relies on the fact that the phrase "interest on such claim" is set off by commas and is followed by the words "and any," indicating that interest is to be treated differently from fees, costs, or charges. The Government argues that since the language is unambiguous and allows for postpetition interest to be awarded on any allowed secured prepetition claim regardless of whether it is consensual or not, this Court should not refer to pre-Code law to interpret section 506(b). The Government suggests further that even if this Court is inclined to review pre-Code law, the punctuation, phraseology and grammatical structure of section 506(b) plainly and unambiguously express Congress' intent to depart from pre-Code law. This is a case of first impression in this Circuit.[2]

We first reject the Government's contention that pre-Code law should not be relied on in interpreting section 506(b) since the provision appears to be unambiguous. While the language of a statute is always the starting point when its construction is at issue, *see Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985), it is only the starting point. As in *Midlantic National Bank v. New Jersey Department of Environmental Protection*, 474 U.S. 494, 106 S. Ct. 755 (1986), and *Kelly v. Robinson*, 107 S. Ct. 353 (1986), pre-Code law should be reviewed in order to better understand the context in which the provision was

[2] Although *In re Colegrove*, 771 F.2d 119, 122 (6th Cir. 1985), stated that § 506(b) "provides for interest on all allowed secured claims where the value of the security is greater that the claim," that statement was dicta since the court was clearly not presented with the issue with which we are currently confronted.



drafted and therefore the language itself. *Midlantic*, 106 S. Ct. at 759-60; *Kelly*, 107 S. Ct. at 358.[3] In fact,

> [t]he normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judically created concept, it makes that intent specific. *The Court has followed this rule with particular care in construing the scope of bankruptcy codifications.*

*Midlantic*, 106 S. Ct. at 759-60 (emphasis added) (citation omitted). *See also Kelly*, 107 S. Ct. at 358-61 & n.12 (Congress was not permitted to "silently abrogate" a judicially created bankruptcy rule).[4] We believe, therefore, that in order to determine if section 506(b) changed the interpretation of a judicially created rule, we must first understand that rule and its origins.

Under pre-Code bankruptcy law, it was a well-established general rule that interest on both secured and unsecured prepetition claims ceased to accrue upon the filing of a bankruptcy petition. *Vanston Bondholders Protective Comm. v. Green*, 329 U.S. 156, 163 (1946); *Sexton v. Dreyfus*, 219 U.S. 339, 344 (1911). This general rule applied to tax liens, *City of New York v. Saper*, 336 U.S.

[3] *See also Watt v. Alaska*, 451 U.S. 259, 266 (1981) (the "ascertainment of the meaning apparent on the face of a single statute need not end the inquiry. This is because the plain meaning rule is 'rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists.' ") (quoting *Boston Sand & Gravel Co. v. United States*, 278 U.S. 41, 48 (1982)) (citations omitted).

[4] In both *Midlantic* and *Kelly*, the Court reviewed the pre-Code judicially created doctrine before analyzing the statutory language itself. While the Government maintains that the rule of statutory construction enunciated in these two cases only applies if there is some overriding public policy for the doctrine itself, we find no support for that position. Rather, if there is a well-established principle in bankruptcy law, we believe *Midlantic* and *Kelly* come into play, requiring Congress to explicitly set forth its intention to deviate from the judicially created rule.

328, 337-38 (1949); *United States v. Mighell*, 273 F.2d 682 (10th Cir. 1959), and had its foundation primarily in the equitable principle that the delays necessitated by bankruptcy proceedings should not place one creditor at an advantage or disadvantage in contrast to other creditors:

> In the context of interest-bearing debts, the equitable principle enunciated in *Sexton* and *Saper* rests at bottom on an awareness of the inequity that would result if, through the continuing accumulation of interest in the course of subsequent bankruptcy proceedings, obligations bearing relatively high rates of interest were permitted to absorb the assets of a bankrupt estate whose funds were already inadequate to pay the principal of the debts owed by the estate.

*Nicholas v. United States*, 384 U.S. 678, 683-84 (1966) (footnote omitted).

Over time, the federal courts created exceptions to this general rule to allow for postpetition interest on prepetition secured claims under the following circumstances: (1) the debtor is proven to be solvent; (2) the property held by the creditor to secure the debt produces income during the course of proceedings; or (3) the value of the collateral securing the debt is sufficient to pay both the claim and postpetition interest on the claim. *See, e.g., In re Boston & Maine Corp.*, 719 F.2d 493, 496 (1st Cir. 1983), *cert. denied*, 466 U.S. 938 (1984);[5] *In re Kerber Packing Co.*, 276 F.2d 245, 246 (7th Cir. 1960); *United States v. Bass*, 271 F.2d 129, 130 (9th Cir. 1959); *In re Macomb Trailer Coach, Inc.*, 200 F.2d 611, 613 (6th Cir. 1952), *cert. denied*, 345 U.S. 958 (1953). The third exception above was created pursuant to the theory that postpetition interest should be allowed where a security agreement had been voluntarily executed and the creditor had successfully

[5] While *Boston & Maine Corp.* is a 1983 decision, it interprets pre-Code law.



bargained for specific, valuable collateral to secure the principal obligation. Accordingly, where the creditor had bargained to become an oversecured creditor, he had an expectation of receiving interest were it necessary to sell the security. *See Kerber Packing Co.*, 276 F.2d at 247; *Bass*, 271 F.2d at 132; *United States v. Harrington*, 269 F.2d 719, 724 (4th Cir. 1959).

It was equally well established by at least four courts of appeals that the third exception—allowing the payment of postpetition interest if the claim was oversecured—did not apply to liens which were nonconsensual in nature, such as tax liens, because the underlying reason for the exception did not apply. *See Kerber Packing Co.*, 276 F.2d at 247; *Mighell*, 273 F.2d at 684; *Bass*, 271 F.2d at 131-32; *Harrington*, 269 F.2d at 721-24. *Cf. Boston & Maine Corp.*, 719 F.2d at 497. In such cases the parties had not bargained concerning particular collateral, and the creditor therefore did not have an expectation of receiving interest. One noted distinction between tax liens and contractual liens is that tax liens often apply to all of the debtor's property, whereas consensual liens are specific in nature and attach to only one asset. *Kerber Packing Co.*, 276 F.2d at 247; *Bass*, 271 F.2d 131-32; *Boston & Maine Corp.*, 719 F.2d at 497 n.1.[6]

[6] The First Circuit in *Boston & Maine Corp.* sets forth an additional reason for not applying the third judicially created exception to nonconsensual liens:

> [T]he payment of the interest, which is secured by the lien, is not contemplated by the parties at the beginning of each tax year. Rather, the imposition of interest on unpaid taxes is more in the nature of an enforcement device assuring the collection of delinquent taxes. In the context of an insolvency proceeding, to grant the taxing entity postpetition interest on its tax lien would impose the "enforcement device" not on the insolvent debtor, but on those lower priority creditors whose claims will go unpaid. Such creditors are but innocent bystanders; they could have done nothing to effect the prompt payment of taxes and avoid the im-

In light of the judicial interpretation under the Bankruptcy Act regarding the payment of postpetition interest, Debtor asserts that section 506(b) does nothing more than codify this third exception to the bar against paying postpetition interest. Several bankruptcy courts, and at least one district court and one commentator, have sided with Debtor in concluding that section 506(b) disallows postpetition interest on prepetition nonconsensual secured claims by virtue of the prior judicial interpretation of the Bankruptcy Act. *See, e.g., In re Newbury Cafe, Inc.*, 72 Bankr. 478 (Bankr. E.D. Mass. 1987) (postpetition interest is not mandated under section 506(b)); *In re Dan-Ver Enters., Inc.*, 67 Bankr. 951 (W.D. Pa. 1986) (language is ambiguous and legislative history supports conclusion that Congress intended to codify pre-Code law), *aff'g* 60 Bankr. 568 (Bankr. W.D. Pa. 1986);[7] *In re Granite Lumber Co.*, 63 Bankr. 466 (Bankr. D. Mont. 1986) (in dicta, court notes that section 506(b) codifies preexisting law allowing interest if the agreement so provides); *In re Churchfield*, 62 Bankr. 399 (Bankr. E.D. Mich. 1986);[8] *In re Venable*, 48 Bankr. 853 (Bankr. S.D.

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position of postpetition interest. To penalize these creditors for the bankrupt's inability to pay its taxes on time violates all notions of equity.

719 F.2d at 497. In other words, although an entity's nonconsensual tax lien may be oversecured, the payment of postpetition interest to that entity nonetheless places it at an advantage in comparison to lower priority creditors, which harps back to the original reason for disallowing interest on any bankruptcy claim. This would be particularly evident, it seems, if the tax lien attaches to a large portion of the estate rather than specifically bargained-for collateral.

[7] The district court in *Dan-Ver* titles its discussion section as "The Case of the Capricious Comma," which is an appropriate characterization of the comma in § 506(b) and the conflict it has caused amongst the courts.

[8] As in the instant case, *Churchfield* was reversed by the District Court for the Eastern District Michigan and an appeal was filed in



N.Y. 1985) (statutory language expressly provides that interest can be granted only pursuant to an agreement); *In re Trent*, 42 Bankr. 279 (Bankr. W.D. Va. 1984) (statutory language is ambiguous and legislative intent was to codify pre-Code law); *In re Stack Steel & Supply Co.*, 28 Bankr. 151 (Bankr. W.D. Wash. 1983) (postpetition interest is not allowable on nonconsensual liens, although court fails to mention section 506(b)); 3 *Collier on Bankruptcy* ¶ 506.05 (15th ed. 1987).

*Collier on Bankruptcy* concludes that section 506(b) "makes express provision for the allowance as part of an allowed secured claim, to the extent the collateral therefor exceeds the amount of such claim and any recovery under section 506(c), interest and reasonable fees, costs or charges *provided for in the governing agreements," id.* at 506-38 (emphasis added), thereby codifying pre-Code case law. *Id.* at n.1. *See also id.* at 506-41. While acknowledging that "[t]here is a split in authority as to whether a statutory entitlement [to postpetition interest] suffices for purposes of section 506(b)," *id.* at 506-41, *Collier on Bankruptcy* concludes that interpreting section 506(b) as disallowing postpetition interest is more in line with pre-Code precedents and is "consistent with the position that the phrase 'provided for under the agreement under which such claim arose' in 11 U.S.C. § 506(b) modifies the phrase 'interest on such claim' which . . . is the preferred position." *Id.* at 506-42 n.5b. Further, this commentator notes that the legislative history does not evidence an intent to change the pre-Code rule. In discussing the grammatical structure of section 506(b) with respect to determining the applicable rate of interest, and in particular the use of the comma to separate the phrase "interest on such claim," *Collier on Bankruptcy* reasons that "[s]uch separation apparently derived from the need the drafters felt to

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this court. A stay pending a decision in the instant case was granted in *Churchfield*.

make clear that interest was to be allowed only to the extent it accrued on the claim (as opposed to any other amount)." *Id.* at 506-43. This commentator notes, however, that a logical explanation for the comma is to allow for postpetition interest on nonconsensual lien claims, although *Collier on Bankruptcy* admittedly is not of that view. *Id.* at n.10.

We are of the opinion that the language of section 506(b), when read in light of the pre-Code judicially created doctrine, codifies the pre-Code law on the issue of allowable postpetition interest. While our interpretation results in a conflict with the Fourth Circuit and with many bankruptcy courts,[9] we are persuaded that our conclusion is correct, particularly in light of the rule of statutory construction enunciated in *Midlantic* and *Kelly*.

We cannot agree with the Fourth Circuit's conclusion that the "plain meaning" of section 506(b) allows for the

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[9] *See, e.g., In re Brandenburg,* 71 Bankr. 719 (Bankr. D.S.D. 1987) (although acknowledging the grammatical ambiguity, court follows *In re Best Repair*); *In re Busone,* 71 Bankr. 201 (Bankr. E.D. N.Y. 1987) (follows *In re Best Repair*); *In re Gilliland,* 67 Bankr. 410, 411 (Bankr. N.D. Tex. 1986) (follows *In re Best Repair,* and reasons that the theory in the pre-Code cases is fundamentally flawed since "[t]he IRS should be no better off nor worse off than any other secured creditor"); *In re Charter Co.,* 63 Bankr. 568 (Bankr. M.D. Fla. 1986) (plain meaning of § 506(b) permits postpetition interest on all oversecured claims); *In re Russo,* 63 Bankr. 335 (Bankr. D. Mass. 1986) (§ 506(b) does not draw distinction between consensual and statutory liens); *In re Henzler Mfg. Co.,* 55 Bankr. 194 (Bankr. N.D. Ohio 1985) (§ 506(b) is not ambiguous and allows postpetition interest on any oversecured claim); *In re Romano,* 51 Bankr. 813 (Bankr. M.D. Fla. 1985) (concludes that § 506(b) authorizes postpetition interest on judgment lien, although court does not provide any analysis); *In re Morrissey,* 37 Bankr. 571 (Bankr. E.D. Va. 1984) (postpetition interest flows from the language of § 506(b)); *In re Loveridge Mach. & Tool Co.,* 36 Bankr. 159 (Bankr. D. Utah 1983) (§ 506(b) applies to all allowed secured claims); *In re Hoffman,* 28 Bankr. 503 (Bankr. D. Md. 1983) (postpetition interest allowed, no analysis provided).



payment of postpetition interest on all allowed oversecured claims, including nonconsensual liens, nor do we agree that our interpretation of the provision "strains the plain meaning of the language and grammar of the provision." *In re Best Repair Co.,* 789 F.2d at 1082. In our view, the Fourth Circuit's conclusion in *Best Repair* is weakened by its subsequent acknowledgment that "§ 506(b) is not so clear that we would not consider its legislative history to aid our interpretation," *id.*, and because it reaches its conclusion without a thorough discussion of pre-Code law, perhaps concluding that pre-Code law is only relevant if the language is ambiguous. In light of *Midlantic* and *Kelly,* we believe such an approach is flawed. Rather, where it is claimed that the Code has significantly altered an existing judicially created concept, courts should review pre-Code law since it may be discovered that the language, when viewed in the proper historical context, is not unambiguous but is actually subject to more than one reasonable interpretation. In the instant case, section 506(b) can be interpreted as incorporating the third judicially created exception to disallowing postpetition interest on prepetition claims, including the limitations placed on that exception by the various circuit courts of appeals.

We conclude that the placement of a comma and the inclusion of the words "and any" do not evince an intention to reject the well-established judicially created concept.[10]

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[10] We do not find the "doctrine of the last antecedent," a statutory construction rule, to mandate an opposite result. While this doctrine does lend some support to the Government's position, *see, e.g., First Charter Fin. Corp. v. United States,* 669 F.2d 1342, 1350 (9th Cir. 1982) ("In construing statutes, qualifying phrases are generally to be applied to the immediately preceding phrase and not to phrases more remote."), we believe that blind resort to such a rule is improper, particularly when applying the rule would require this court to ignore pre-Code law and the statutory construction rule set forth in *Midlantic* and *Kelly*. Further, the phrase "interest on such claim" is not "remote"

The admitted lack of legislative history on this point lends further credence to our position.[11] If Congress intended to depart from pre-Code law with respect to only this one portion of section 506(b), particularly when several courts of appeals were unanimous in their interpretation of the Bankruptcy Act, such an intent must be expressed explicitly and not through the ambiguous use of a comma and the words "and any." *Cf. Egyptian Supply Co. v. Boyd,* 117 F.2d 608, 611 (6th Cir. 1941) (punctuation should be regarded as a "last resort in construing doubtful statutes").

Accordingly, we REVERSE the order of the district court and reinstate the order of the Bankruptcy Court.

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from the qualifying phrase at issue. *Cf. District 6, UMW v. United States Dept. of Interior Bd. of Mine Operations Appeals,* 562 F.2d 1260, 1264-65 & n.17 (D.C. Cir. 1977) (resort to the last antecedent rule found to be improper when the qualifying phrase could modify either the preceding short clause or the preceding main clause, creating an ambiguity).

[11] The Senate Report, the House Report, and statements of the chairmen on the responsible subcommittees do not address the language in section 506(b) referring to interest. Rather the Senate and House Reports only refer to fees, costs and charges:

> Subsection (b) codifies current law by entitling a creditor with an oversecured claim to any reasonable fees (including attorney's fees), costs, or charges provided under the agreement under which the claim arose. These fees, costs, and charges aare [sic] secured claims to the extent that the value of the collateral exceeds the amount of the underlying claim.

S. Rep. No. 989, 95th Cong., 2d Sess. 68, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5854; *see also* H.R. Rep. No. 595, 95th Cong., 2d Sess. 356-57, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6312 (House Report does not have the parenthetical statement included above). The statements of the committee chairmen only explain why the reference to the attorney's fees was eliminated.



**APPENDIX B**

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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No. 86-1785

IN RE: RON PAIR ENTERPRISES, INC., DEBTOR

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UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

*v.*

RON PAIR ENTERPRISES, INC. d/b/a MIDWEST INTERNATIONAL ENVIRONMENTAL DIVISION AND d/b/a INDUSTRIAL ENVIRONMENTAL SUPPLY COMPANY, DEFENDANT-APPELLANT

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[Filed Sept. 4, 1987]

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Before: KENNEDY and MILBURN, Circuit Judges; and CONTIE, Senior Circuit Judge.

**JUDGMENT**

ON APPEAL from the United States District Court for the Eastern District of Michigan.

THIS CAUSE came on to be heard on the record from the said district court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said district court in this case be and the same is hereby reversed.

Each party is to bear its own costs on appeal.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
John P. Hehman, Clerk

A True Copy.

Attest:

/s/ TOM BENNIGNUS
Deputy Clerk

Issued as Mandate: October 1, 1987



**APPENDIX C**

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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Chapter 11 Bankruptcy No. 84-01606-G

IN THE MATTER OF:
RON PAIR ENTERPRISES, INC., d/b/a MIDWEST INTERNATIONAL ENVIRONMENTAL DIVISION AND d/b/a INDUSTRIAL ENVIRONMENTAL SUPPLY COMPANY, DEBTOR

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CASE NO. 85-CV-75680-DT

UNITED STATES OF AMERICA, APPELLANT

*v.*

RON PAIR ENTERPRISES, INC. d/b/a MIDWEST INTERNATIONAL ENVIRONMENTAL DIVISION AND d/b/a INDUSTRIAL ENVIRONMENTAL SUPPLY COMPANY, APPELLEE

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[Filed July 2, 1984]

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**ORDER REVERSING THE ORDER OF THE BANKRUPTCY COURT AND AWARDING POST-PETITION INTEREST TO THE UNITED STATES**

This matter having been submitted for a decision by the undersigned, the parties having submitted briefs and it appearing that this Court has jurisdiction to hear and determine this appeal from the ruling of the Bankruptcy Court on the issue of whether the United States is entitled to post-petition interest on its over-secured pre-petition tax claim pursuant to the terms of Section 506(b) of the

Bankruptcy Code, and it appearing that the plain language of Section 506(b) entitles the United States to such post-petition interest, and such an interpretation has been upheld by the United States Court of Appeals for the Fourth and Sixth Circuits in *In re Colegrove,* 771 F.2d 119 (6th Cir. 1985) and *In re Best Repair Company, Inc.*, No. 85-1907 (4th Cir., May 8, 1986);

IT IS THEREFORE ORDERED, ADJUDGED and DECREED that (i) the December 9, 1985 Order of the Bankruptcy Court in Case No. 84-01606-G is reversed; and (ii) the United States, is entitled to post-petition interest on its over-secured pre-petition tax claim pursuant to the provisions of 11 U.S.C., Section 506(b).

DONE and ORDERED this 30th day of June, 1986.

/s/ HORACE W. GILMORE
Horace W. Gilmore
United States District Court Judge



**APPENDIX D**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

---

CASE NO. 84-01606-G
CHAPTER XI

IN THE MATTER OF:
RON PAIR ENTERPRISES, INC., d/b/a MIDWEST INTERNATIONAL ENVIRONMENTAL DIVISION AND d/b/a INDUSTRIAL ENVIRONMENTAL SUPPLY COMPANY,
DEBTOR.

---

[Filed December 9, 1985]

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**MEMORANDUM OPINION AND ORDER DENYING THE OBJECTION OF THE UNITED STATES TO CONFIRMATION OF DEBTOR'S FIRST AMENDED PLAN OF REORGANIZATION**

AT A SESSION of the United States Bankruptcy Court, held in the Chambers of the Honorable Ray Reynolds Graves, Room 1063 U.S. Courthouse, City of Detroit, County of Wayne, State of Michigan.

Present: The Honorable Ray Reynolds GRAVES,
United States Bankruptcy Judge

The debtor, Ron Pair Enterprises, filed a petition under Chapter 11 of the United States Bankruptcy Code on May 1, 1984. On September 17, 1985, the United States Internal Revenue Service (IRS) filed a proof of claim on its secured claim for prepetition tax liens filed on December 20, 1983 and March 23, 1984. On November 4, 1985 IRS filed a

notice of objection to confirmation of the first amended plan of reorganization of this Chapter 11 debtor.

The debtor and the IRS agree that the debtor currently owes no administrative taxes to the United States, that prepetition federal taxes will be paid through deferred monthly payments upon confirmation of the plan and will bear interest at the rate of 10% per annum, that the IRS has a properly perfected security interest in the debtor's assets amounting to $53,277.93. The parties also agree that the sole issue in this case is the IRS' right to interest on its secured tax claim between the date of the filing of the petition and the date of the confirmation of the plan. (The parties agree that there is sufficient collateral covered by the IRS' properly perfected tax lien to satisfy both the principal secured tax claim and the post-petition pre-confirmation interest accruing on that claim.) 11 U.S.C. § 506(b) does not require payment of interest on the properly perfected tax lien held by the IRS during the post petition pre-confirmation "gap period."

Even if the security for the perfected tax lien is sufficient to pay the interest as well as the principal amount of the claim, interest is not authorized under § 506(b). Five Courts of Appeal have decided this issue. It appears that the clear weight of authority supports the conclusion that the IRS is not entitled to interest on its allowed secured tax claim for the period from the date of the filing of the petition until the order of confirmation of the plan of reorganization. *In re: Kerber Packing Company,* 276 F.2d 245 (C.A. 7, 1960); *United States v Bass,* 271 F.2d 129 (C.A. 9, 1959); *United States v Harrington,* 269 F.2d 719 (C.A. 4, 1959); *United States v Mighell,* 273 F.2d 682 (C.A.2, 1959); and *In re: Boston & Main Corp.,* 719 F.2d 493 (C.A. 1, 1983). This court sees no reason to deviate from the sound reasoning of the various Courts of Appeal that have already disposed of this issue. We also see no reason to change the general rule that interest on pre-



petition claims, both secured and unsecured, stops accruing upon the filing of the petition. *Vanston Bondholders Protective Committee v Green,* 329 US 156 (1946); *City of New York v Saper,* 336 US 328 (1948).

The objection of the United States Internal Revenue Service is DENIED and the previously confirmed plan of this Chapter 11 debtor may be completed without the payment of "gap period" interest on the allowed secured claim of the Internal Revenue Service.

IT IS SO ORDERED.

/s/ RAY REYNOLDS GRAVES
Ray Reynolds Graves
United States Bankruptcy Judge

Dated: 12/6/85

**APPENDIX E**

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

---

Chapter 11
Case No. 84-01606-G

IN RE: RON PAIR ENTERPRISES, INC., d/b/a MIDWEST INTERNATIONAL ENVIRONMENTAL DIVISION AND d/b/a INDUSTRIAL ENVIRONMENTAL SUPPLY COMPANY, DEBTOR.

---

**ORDER CONFIRMING FIRST AMENDED PLAN OF REORGANIZATION AS MODIFIED**

At a session of said court held in the Federal Building, City of Detroit, County of Wayne, State of Michigan, on [December 3, 1985].

Present: Honorable Ray Reynolds GRAVES,
United States Bankruptcy Judge

The First Amended Plan of Reorganization ("Plan") of the Debtor under Chapter 11 of the Bankruptcy Code having been filed on October 1, 1985, and attached as Exhibit A to the Debtor's Amended Disclosure Statement and thereafter transmitted to creditors; counsel for the Debtor having stated that Michigan National Bank Macomb has withdrawn its objections to Confirmation; that pursuant to an objection filed by the United States of America, Internal Revenue Service ("IRS") and an objection received from the State of Michigan, the interest on the allowed tax claims to be paid the IRS and the State of Michigan has been revised from eight (8%) percent to ten (10%) percent



per annum; that the IRS has withdrawn its remaining objection to the Debtor's Plan for failure to provide interest on the IRS' allowed pre-petition secured claim from the date of the filing of the petition until confirmation, noting that it is not an objection to confirmation but an issue to be decided by the Court after Confirmation on the briefs already submitted; that the Amended Plan should be further modified to include Class X, Charlevoix Development Corporation, an unimpaired secured creditor (land contract vendor) to whom the Debtor will continue to make monthly payments of $170.00 pursuant to the terms of the land contract currently in effect; that the Debtor has filed an Application to Modify First Amended Plan of Reorganization containing the above revisions; and notice having been duly given of a hearing on confirmation of the Plan;

IT IS HEREBY FOUND AND DETERMINED AFTER NOTICE AND A HEARING:

1. That the proposed modifications are not material and do not adversely change the treatment of the claim of any creditor or the interest of any equity security holder who has not accepted in writing the modification and that it therefore be deemed accepted by all creditors and equity security holders who have previously accepted the Plan.

2. The Plan has been overwhelmingly accepted in writing by the creditors and equity security holders whose acceptance is required by law.

3. The Plan complies with the applicable provisions of Chapter 11 of the Bankruptcy Code.

4. The proponent of the Plan has complied with the applicable provisions of Chapter 11 of the Bankruptcy Code.

5. The Plan has been proposed in good faith and not by any means forbidden by law.

6. All payments made or promised by the Debtor under the Plan for services or for costs and expenses in

connection with the Plan and incident to the case, have been fully disclosed to the Court and are reasonable, or if to be fixed after confirmation of the Plan, will be subject to the approval of the Court.

7. The identity, qualifications, and affiliations of the persons who are or may be directors or officers or trustees, if any, of the Debtor after confirmation of the Plan have been fully disclosed and appointment of such persons to such offices or their continuance in those offices is equitable and consistent with the interests of the creditors and equity holders and with public policy.

8. The identity of any insider that will be employed or retained by the Debtor and his compensation has been fully disclosed.

9. There are no rate charges over which any regulatory commission will have jurisdiction included in the Plan.

10. Each holder of a claim or interest has accepted the Plan or will receive or retain under the Plan property of a value, as of the Effective Date of the Plan, that is not less than the amount that such holder would receive or retain if the Debtor were liquidated under Chapter 7 of the Bankruptcy Code on such date.

11. Each class has accepted the Plan, or the class is not impaired under the Plan.

12. Except to the extent that the Plan provides that all other expenses of administration shall be paid in the ordinary course of business, the Plan provides that with respect to the § 507(a)(1) expense of administration claims of the attorneys for the Debtor, attorneys for the Creditors' Committee and accountants of the Debtor upon allowance by the Court payment will be made in full upon the Confirmation date of the Plan.

13. There are no claims under § 507(a)(2), (4), (5), or (6).

14. Claims under § 507(3) shall receive on account of such claim, cash equal to the allowed amount of such



claim upon the effective date of the Plan.

15. Holders of claims of a kind specified in § 507(a)(7) of the Bankruptcy Code will receive on account of such claim deferred cash payments, over a period not exceeding six (6) years after the date of assessment of such claim, of a value as of the effective date of the Plan, equal to the allowed amount of such claim with interest as provided in the Modified Amended Plan. Any additional interest which may be due the IRS on its allowed pre-petition secured claim covering the interim period from the date of filing of the petition until confirmation will be payable in monthly installments along with the allowed pre-petition secured claim only if the Court enters a final Order adverse to the Debtor's position.

16. Confirmation of the Plan is not likely to be followed by liquidation or the need for further financial reorganization of the Debtor or any successor of the Debtor under the Plan.

17. The objection to confirmation filed by Michigan National Bank Macomb has been withdrawn, as is evidenced by the approval of Michigan National Bank Macomb to entry of this Order.

18. The objection to Confirmation filed by IRS has been withdrawn as is evidenced by the approval of the IRS to entry of this Order.

IT IS HEREBY ORDERED that:

1. The First Amended Plan of Reorganization filed by Debtor, Ron Pair Enterprises, on October 1, 1985, is confirmed as modified herein.

2. The provisions of the Plan bind the Debtor and all creditors and equity security holders of the Debtor, including any person that might acquire equity securities of the Debtor by sale, pledge, foreclosure, or otherwise.

3. This Order of Confirmation shall have the effect set forth in 11 U.S.C. § 1141 and shall invest in the Debtor all of the property of the estate, free and clear of all claims,

liens and interests of creditors and of equity security holders except as otherwise provided in the Plan, documents and other orders executed in connection with this Plan, and in this Order and all holders of claims shall, promptly upon the Order becoming final and non-appealable, provide Debtor with appropriate releases of liens which have been filed of record. Except as otherwise provided in the Plan, documents and other orders executed in connection with the Plan, and in this Order, this Order discharges the Debtor from any debt that arose before the date of such confirmation and any debt of the kind specified in 11 U.S.C. § 502(g), (h) or (i). All creditors whose debts are discharged by this Order are permanently enjoined from instituting or continuing any action or employing any process to collect such debts as personal liabilities of the Debtor.

4. This Court, in addition to any specific retention of jurisdiction provided for in the Plan and Disclosure Statement, shall generally retain jurisdiction for the purposes set forth in the Plan and Disclosure Statement.

5. The Objections to Confirmation of Plan filed by Michigan National Bank Macomb and United States of America, Internal Revenue Service be and hereby are withdrawn.

/s/ RAY REYNOLDS GRAVES
U.S. Bankruptcy Judge



## APPENDIX F

**§ 506. Determination of secured status**

(a) An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or a plan affecting such creditor's interest.

(b) To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.

(c) The trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim.

(d) To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void, unless—

(1) such claim was disallowed only under section 502(b)(5) or 502(e) of this title; or

(2) such claim is not an allowed secured claim due only to the failure of any entity to file a proof of such claim under section 501 of this title.

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Supreme Court, U.S.
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No. 87-1043

In The
# Supreme Court of the United States
October Term, 1987

UNITED STATES OF AMERICA,
*Petitioner,*
v.
RON PAIR ENTERPRISES, INC.,
*Respondent.*

## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

I. WILLIAM COHEN
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February 28, 1988

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## QUESTION PRESENTED

Whether Section 506(b) of the Bankruptcy Code (11 U.S.C.) & (Supp IV) entitles a non-consensual lien creditor to receive post-petition interest on an over secured claim in a bankruptcy proceeding.

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No. 87-1043

In The

# Supreme Court of the United States

October Term, 1987

UNITED STATES OF AMERICA,

*Petitioner,*

v.

RON PAIR ENTERPRISES, INC.,

*Respondent.*

## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Ron Pair Enterprises, Inc., by its counsel I. William Cohen, Esq. and Michael H. Traison, Esq. of Hertzberg, Jacob & Weingarten, P.C., opposes the petition of the United States of America for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

## OPINIONS BELOW

Respondent adopts Petitioner's statement of the Opinions Below.

———o———

## JURISDICTION

Respondent adopts Petitioner's statement of jurisdiction.

———o———

## STATUTE INVOLVED

Section 506 of the Bankruptcy Code (11 U.S.C.) & Supp. IV as set out in Petitioner's statutory appendix to its petition.

———o———

## STATEMENT OF THE CASE

Respondent adopts Petitioner's statement of the case as stated in its Petition.

———o———

## ARGUMENT

Respondent agrees that the decision of the Court of Appeals for the Sixth Circuit concerns a significant bankruptcy issue and that its decision directly conflicts with the decision of another court of appeals. Respondent concurs that the question presented is a frequently recurring one that is of considerable administrative importance.



However, the Court of Appeals for the Sixth Circuit decided this case correctly, had the benefit of the erroneous decision of the Court of Appeals for the Fourth Circuit when considering its decision and distinguished it. The Supreme Court should not disturb the decision below.

The Bankruptcy Court and the Court of Appeals for the Sixth Circuit correctly relied on cases decided before and after the enactment of the Bankruptcy Code. It is clear that 11 U.S.C. Section 506(b) is intended to codify pre-Code law prohibiting the payment of post-petition interest on pre-petition non-consensual lien claims. Nothing in the legislative history indicates that 11 U.S.C. Section 506(b) was intended to overrule the long standing prohibition against paying post-petition interest on pre-petition non-consensual lien claims.

The general rule in bankruptcy and other insolvency proceedings is that interest ceases to run on secured and unsecured claims with the initiation of the proceeding, i.e., the filing of the petition. *Vanston Bondholders Protective Committee v. Green*, 329 U.S. 156 (1946); *City of New York v. Saper*, 336 U.S. 328 (1949); *Sexton v. Dreyfus*, 219 U.S. 339 (1911).

As the Supreme Court in *Thomas v. Western Car Company*, 149 U.S. 95 (1893) explained:

> Exaction of interest, where the power of a debtor to pay even his contractual obligations is suspended by law, has been prohibited because it was considered in the nature of a penalty imposed because of delay in prompt payment—a delay necessitated by law if the courts are properly to preserve and protect the estate for the benefit of all interests involved . . . As a gen-

> eral rule, after property of an insolvent passes into the hands of a receiver or of an assignee in insolvency, interest is not allowed on the claims against the funds. The delay in distribution is the act of the law; it is a necessary incident to the settlement of the estate.

Historically governmental entities' claims for past due taxes received special treatment, accruing post-petition interest until the date of payment. See *City of New York v. Saper, supra.* In *Saper*, however, the Supreme Court held that the general prohibition against the payment of post-petition interest also embraced tax claims in bankruptcy cases.

> The Court of Appeals concluded that by the 1926 amendment and the Chandler Act, Congress assimilated taxes to other debts for all purposes, including denial of post-bankruptcy interest. We think this is a sound and logical interpretation of the Act after those amendments to 64(a) and 57(n). Considered in conjunction with the general rule against post-bankruptcy interest as well as 63's limitations of interest on other claims to date of bankruptcy, they compel our conclusions, already stated, that the *statute as amended did not contemplate any exception in favor of tax claims.* (Emphasis added).

336 U.S. at 338.

*Saper's* ban on post-petition interest for tax claims has been extended to Chapter X Reorganizations, *United States v. Edens*, 189 F.2d 876, 877 (4th Cir. 1951), *aff'd per curiam*, 342 U.S. 912 (1952); Chapter XI Arrangements, *Commonwealth of Massachusetts v. Thompson*, 190 F.2d 10, 10-11 (1st Cir. 1951), *cert. denied*, 342 U.S. 918 (1952); *United States v. General Engineering and Manufacturing Co.*, 188 F.2d 80, 81-83 (8th Cir. 1951), *aff'd per*



*curiam*, 342 U.S. 912 (1952) and Section 77 railroad reorganizations, *In re New York, New Haven and Hartford Railroad Co.*, 304 F.Supp. 1121, 1129-32 (D. Conn. 1969).

Following *Saper* the Government attempted to have the courts confine that ruling to pre-petition tax claims not reduced to liens. Three District Courts were not so persuaded. *In re Industrial Machine & Supply Co.*, 112 F.Supp. 261 (W.D. Pa. 1953); *In re Lykens Hosiery Mills*, 141 F.Supp. 895 (S.D. N.Y. 1956) and *In re Cameron*, 166 F.Supp. 400 (S.D. Cal. 1958). *Contra In re Parchem*, 166 F.Supp. 724 (D. Minn. 1958); *In re Ross Nursing Home*, 2 B.R. 496 (Bkcy. E.D. N.Y. 1980).

As previously stated, the IRS grounds its request for post-petition interest on 11 U.S.C. § 506(b):

> To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs or charges provided for under the agreement under which such claim arose.

A careful reading of Section 506(b) leads one correctly to conclude that it is a codification of the third exception to the general prohibition against allowing post-petition interest on an allowed secured claim filed in bankruptcy. *In re Churchfield*, 14 BCD 657 (E.D. Mich. 1986); 3 *Collier on Bankruptcy*, ¶ 506.05 at 506-37 n. 1 (15th ed. 1979); *contra, In re Loveridge Machine & Tool Co.*, 9 C.B.C. 2d 1329, 1332, n. 4. The third exception is that "the security (collateral) is sufficient to pay interest as well as the principal amount of the claim." As perceptively

pointed out by the Honorable Arthur J. Spector in *Churchfield, supra* at 658 (Bkcy. E.D. Mich. 1986), "Before there was a Bankruptcy Code there was a Bankruptcy Act." Accordingly, the analysis set forth in the pre-Code cases is controlling and must govern here.

The Seventh Circuit in *In re Kerber Packing Company*, 276 F.2d 245 (7th Cir. 1960), distinguished the Government's secured status as the result of a statutory lien from those creditors who held consensual liens.

> The third exception to the rule that interest does not accrue subsequent to filing provides protection to the creditor in his security which on liquidation produces a sufficient amount to satisfy the encumbrance and interest thereon. In the case of a mortgage or deed of trust, an *encumbrance is placed on the property voluntarily by the debtor as security for his deed after agreement with the creditor.* By this act the debtor authorizes not only the satisfaction of the deed out of the sale of the particular property but agrees to the payment of any deficiency that might arise after the sale and that other property he may own may be subjected to execution for payment of a deficiency judgment.
>
> This exception has been recognized by the courts to the extent of allowing post-bankruptcy interest to *creditors who are deemed to have bargained for collateral to secure not only the principal obligation but the interest thereon as well.* Usually the allowance has been in cases involving either mortgages, deeds of trust, bonds secured by collateral or a vendor's lien on a particular chattel and involving liens upon specific property of the bankrupt growing out of a contract between him and the creditor. (Emphasis added).



276 F.2d at 247. *Kerber* denied the IRS' request for post-petition interest in accord with the decisions of the Fourth, Ninth and Tenth Circuits.

*Best Repair Co.*, 789 F.2d 1080 (4th Cir. 1986) is wrongly decided. It completely ignores the pre-Code cases on this issue and ascribes undue import to the word "any", which is no more than mere surplusage.

Section 506(b) is not clear, is not susceptible of any one interpretation, and does not have one "natural meaning".

Confronted with the identical issue now before this Court in *In re Churchfield*, 14 BCD at 658, the Honorable Arthur J. Spector respectfully disagreed with the Fourth Circuit's conclusion that Section 506(b) contains "plain terms" which compel the result it reached.

> Not being an authority on English grammar punctuation, we find that the words and punctuation of the Statute are hopelessly ambiguous, and so move on to analyze their meaning through examination of legislative intent, which even the Fourth Circuit believed was necessary and appropriate.

*Churchfield, supra* at 658.

The legislative intent clearly did not change existing case law.

The Notes of Committee on the Judiciary, Senate Report No. 95-989 state:

> Subsection (b) *codifies current law* by entitling a creditor with an oversecured claim to any reasonable fees (including attorney's fees), costs, or charges provided under the *agreement under which the claim arose.*" (Emphasis added).

This language is repeated in the Legislative Statements found in the Historical and Revision Notes.

> Section 506(b) of the House amendment adopts language contained in the Senate amendment and rejects language contained in H.R. 8200 as passed by the House. *If the security agreement between the parties provides for attorneys' fees*, it will be enforceable under Title 11, notwithstanding contrary law, and is recoverable from the collateral after any recovery under 506(c).

Legislative history does not indicate that by enacting Section 506(b) Congress affirmatively intended to expand the third exception to the general prohibition against paying post-petition interest on pre-petition secured claims to include nonconsensual tax liens.

> Pre-Bankruptcy Code precedent more strongly supports the latter view (IRS not entitled to post-petition interest on secured tax claim), and there is no evidence in the legislative history of 26 U.S.C. 6621 of Congressional intent to change that result.

3 *Collier on Bankruptcy*, § 506.05, p. 506-40.

In the face of the confusing commas, Section 506(b)'s ambiguity, and the absence of any indication whatsoever that Congress intended, considered, or even contemplated changing the case law which preceded enactment of Section 506(b), pre-Code cases should continue to govern.

The Court of Appeals for the Sixth Circuit correctly rejected the reasoning in *Best Repair*, *supra* in concluding that the placement of a comma and the inclusion of the words "and any" do not evince an intention to reject the well-established judicially created concept. As stated by



that court "the admitted lack of legislative history on this point lends further credence to [its] position. If Congress intended to depart from pre-Code law with respect to only this one portion of Section 506(b), . . . such an intent must be expressed explicitly and not through the ambiguous use of a comma . . . ." *In re Ron Pair Enterprises, Inc.*, 828 F.2d 367 (6th Cir. 1987).

Since the issuance of the Sixth Circuit's decision, the District Court in *Nevada Environmental Landfill*, 16 BCD 1248 (D. NV. 1987) similarly rejected the erroneous reasoning in *Best Repair* holding that current bankruptcy law further supports the distinction between consensual and non-consensual items and affirming that pre-Code bankruptcy law prohibiting post-petition interest on non-consensual liens has not been altered by the language of Section 506(b).

Finally, in *United Savings Association of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 56 USLW 4107 (January 20, 1988) the United States Supreme Court rejected claims of undersecured creditors for post-petition interest on their claims. This Court stated that Section 506(b) merely codifies pre-Code bankruptcy law. Acknowledging the pre-Code rule denying such interest, the Supreme Court stated that had Congress nevertheless meant to give undersecured creditors interest on the value of their collateral it would have said so plainly in Section 506(b). *See United Savings Association of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 56 USLW 4107 at 4109.

As the Supreme Court stated so recently in *Timbers of Inwood:*

> Such a major change in the existing rules would not likely have been made without specific provision in the text of the statute, c.f. *Kelly v. Robinson*, 479 U.S. —, — (1987); it is most improbable that it would have been made without even any mention in the legislative history.

*United Savings Association of Texas, supra* at 4109.

The issue here is whether 11 U.S.C. Section 506(b) applies to pre-petition non-consensual tax lien claims so as to permit interest on those claims to continue to accure after the filing of the bankruptcy petition until confirmation of the Debtor's Plan. Section 506(b) is a codification of the third exception to the general rule prohibiting such post-petition interest on a pre-petition non-consensual tax lien claim. The Section's legislative history is silent as to how Congress intended to deal with the payment of such interest and there is no indication that Congress intended to overrule prior, virtually unanimous, case law on this point. As recognized by the United States Supreme Court, silence is dangerous when one is attempting to overrule judicially created concepts. *Watt v. Alaska*, 451 U.S. 259 (1981). If Congress intends for legislation to change the interpretation of the judicially created concept, it makes that intent specific. *Mid Atlantic National Bank v. New Jersey*, 474 U.S. — (1986).

———o———



## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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February 28, 1988

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CLERK

No. 87-1043

# In the Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES OF AMERICA, PETITIONER

*v.*

RON PAIR ENTERPRISES, INC.

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## BRIEF FOR THE UNITED STATES

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## QUESTION PRESENTED

Whether Section 506(b) of the Bankruptcy Code (11 U.S.C. (& Supp. IV)) entitles a creditor to receive post-petition interest on an oversecured claim allowed in a bankruptcy proceeding.

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# In the Supreme Court of the United States

OCTOBER TERM, 1987

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No. 87-1043

UNITED STATES OF AMERICA, PETITIONER

*v.*

RON PAIR ENTERPRISES, INC.

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*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 828 F.2d 367. The opinion of the district court (Pet. App. 15a-16a) is unofficially reported at 86-2 U.S. Tax Cas. (CCH) ¶ 9642. The opinions of the bankruptcy court (Pet. App. 17a-19a, 20a-24a) are unreported.

### JURISDICTION

The judgment of the court of appeals (Pet. App. 13a-14a) was entered on September 4, 1987. On November 24, 1987, Justice Scalia extended the time for filing a petition for a writ of certiorari to and including December 24, 1987. The petition was filed on December 21, 1987, and was granted on March 21, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTE INVOLVED

Section 506 of the Bankruptcy Code (11 U.S.C. (& Supp. IV)) provides:

**Determination of secured status**

(a) An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

(b) To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.

(c) The trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim.

(d) To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void, unless—



(1) such claim was disallowed only under section 502(b)(5) or 502(e) of this title; or

(2) such claim is not an allowed secured claim due only to the failure of any entity to file a proof of such claim under section 501 of this title.

## STATEMENT

1. Section 506 of the Bankruptcy Code (11 U.S.C. (& Supp. IV)) concerns the treatment of secured claims in bankruptcy proceedings. Section 506 was enacted, together with the rest of the Bankruptcy Code, in the comprehensive overhauling of the bankruptcy laws accomplished by the Bankruptcy Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549. Section 506(b) addresses circumstances in which a claim against the bankruptcy estate is "oversecured," *i.e.*, the situation where the value of the property constituting the security exceeds the amount of the allowed secured claim (together with certain administrative costs of preserving or disposing of the property for the creditor's benefit). In the case of an oversecured claim, "there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose" (11 U.S.C. (Supp. IV) 506(b)).

2. On May 1, 1984, respondent petitioned the United States Bankruptcy Court for the Eastern District of Michigan for a reorganization under Chapter 11 of the Bankruptcy Code, 11 U.S.C. (& Supp. IV) 1101 *et seq.* The government filed a timely proof of claim for $53,278 in assessed and unpaid withholding and social security taxes, penalties, and interest that had accrued prior to the filing of the petition in bankruptcy. The claim was secured by tax liens on property owned by respondent for which

notice had been properly filed. The parties stipulated that the value of the collateral securing the tax claim was sufficient to pay this claim, along with any post-petition interest that was due on the claim. Pet. App. 2a.

On October 1, 1985, respondent filed its First Amended Plan of Reorganization. This plan provided for the payment of the government's claim, including the portion allocable to pre-petition interest, but it did not provide for the payment of post-petition interest on that claim. The government filed a timely objection to the plan, arguing, inter alia, that Section 506(b) entitled it to receive post-petition interest on its oversecured claim. Pet. App. 2a. The bankruptcy court confirmed the plan (*id.* at 20a-24a), but it reserved for resolution in a future order the question whether the government was entitled to post-petition interest (see *id.* at 23a).

3. Subsequently, the bankruptcy court denied the government's objection and ordered that the plan could be completed without payment of post-petition interest to the government (Pet. App. 17a-19a). The court relied upon case law that had developed in the lower courts prior to the enactment of the Bankruptcy Code, *i.e.*, under the Bankruptcy Act of 1898, ch. 541, 30 Stat. 544. Several court of appeals cases had held that the Bankruptcy Act did not require the payment of post-petition interest on nonconsensual liens, *i.e.*, liens that were not voluntarily established by the debtor. See, *e.g.*, *In re Kerber Packing Co.*, 276 F.2d 245 (7th Cir. 1960); *United States* v. *Bass*, 271 F.2d 129, 131-132 (9th Cir. 1959). The bankruptcy court stated that it saw "no reason to deviate from the sound reasoning of the various Courts of Appeal that have already disposed of this issue" (Pet. App. 18a). Because a federal tax lien is a nonconsensual lien, these old court of appeals cases meant that the United States was not entitled



to recover post-petition interest on its oversecured claim, and the bankruptcy court so held.

The district court reversed (Pet. App. 15a-16a). The court held that "the plain language of Section 506(b) entitles the United States to such post-petition interest" (Pet. App. 16a). The court further stated that this interpretation of the new Bankruptcy Code had been upheld by two courts of appeals, citing *In re Best Repair Co.*, 789 F.2d 1080 (4th Cir. 1986), and *In re Colegrove*, 771 F.2d 119 (6th Cir. 1985) (Pet. App. 16a).

4. The Sixth Circuit reversed and reinstated the order of the bankruptcy court, holding that Section 506(b) does not require that post-petition interest be paid on oversecured claims that are founded upon nonconsensual liens (Pet. App. 1a-12a). The court first "reject[ed] the Government's contention that pre-Code law should not be relied on in interpreting section 506(b) since the provision appears to be unambiguous" (Pet. App. 4a). Citing this Court's decisions in *Kelly* v. *Robinson*, No. 85-1033 (Nov. 12, 1986), and *Midlantic Nat'l Bank* v. *New Jersey Dep't of Envtl. Protection*, 474 U.S. 494 (1986), the court stated that the Bankruptcy Code provision should be interpreted with reference to pre-Code law "in order to better understand the context in which the provision was drafted and therefore the language itself" (Pet. App. 4a-5a). The court of appeals then proceeded with an extensive discussion of pre-Code law. It noted that the courts had established a general rule, based on equitable principles, that interest ceased to accrue on the date the petition was filed. The courts had also developed some exceptions to this rule, including an exception allowing post-petition interest when the claim involved was oversecured. But, the Sixth Circuit continued, four courts of appeals had held that this exception did not apply to nonconsensual liens, such as tax

liens. The court noted that two reasons that had been given for this distinction were that in the case of a consensual lien the parties had bargained for security with respect to interest, and that tax liens often applied to all of the debtor's property, whereas consensual liens attached only to one asset. Pet. App. 5a-7a.

The court then held that "the language of section 506(b), when read in light of the pre-Code judicially created doctrine, codifies the pre-Code law on the issue of allowable postpetition interest" (Pet. App. 10a). Relying on the lack of any legislative history specifically addressed to this point (*id.* at 12a) and "the rule of statutory construction enunciated in *Midlantic* and *Kelly*" (*id.* at 10a), the court of appeals found that the language of Section 506(b) did not evince an unambiguous intention to reject the pre-Code judicially-created doctrine (Pet. App. 10a-12a). The court concluded that if Congress intended to depart from pre-Code law in Section 506(b), "such an intent must be expressed explicitly and not through the ambiguous use of a comma and the words 'and any' " (*id.* at 12a).[1]

## SUMMARY OF ARGUMENT

A. The natural reading of Section 506(b) is that it entitles all holders of oversecured claims to receive postpetition interest. The text, grammatical structure, and context of the provision all strongly indicate that Congress intended to confer upon the holders of oversecured claims the right to recover two different categories of payments—

[1] The court of appeals disavowed (Pet. App. 4a n.2) as dicta its prior statement that Section 506(b) "provides for interest on all allowed secured claims where the value of the security is greater than the claim" (*In re Colegrove*, 771 F.2d at 122).



"interest on such claim" and "any reasonable fees, costs, or charges provided for under the agreement under which such claim arose." The legislative history also indicates that Congress viewed interest as a type of payment distinct from the other kinds listed in the provision.

By contrast, the court of appeals' suggested reading—that the qualifying clause "provided for under the agreement" modifies not only the last antecedent phrase but also "interest," the earlier antecedent that is set off by a comma and a conjunction—"strains the plain meaning of the language and grammar of [Section 506(b)]" (*In re Best Repair Co.*, 789 F.2d 1080, 1082 (4th Cir. 1986)). The court of appeals' reading reduces Section 506(b) to a provision that applies only to the holders of claims secured by consensual liens and that does not apply at all to the holders of other kinds of secured claims. That reading is at odds with the broad language of the provision and its placement in Section 506(b), which is the "basic Code provision" governing all secured claims (see 3 *Collier on Bankruptcy* ¶ 506.01, at 506-02 (L. King 15th ed. 1988)). Moreover, if such had been Congress's intent, it is not apparent why the drafters did not use the method repeatedly used elsewhere in the Code to limit the application of provisions to consensual liens—namely, using the phrase "security interest," which is the term of art defined in the Code to cover a "lien created by an agreement" (11 U.S.C. (Supp. IV) 101(45)).

B. The basic rule of statutory construction is that the plain meaning of a statute should be followed, except in "rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters." *Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982). There is clearly no reason in this case to depart from the natural meaning of Section 506(b).

The provision is specifically directed at the question presented here, the treatment of secured claims, and therefore there is no reason to believe that Congress was unaware that the plain language of the statute would confer the right to post-petition interest upon all holders of oversecured claims. There is nothing inherently unreasonable about such an approach, which simply treats all secured claims equally with respect to interest. Indeed, that approach accords with Congress's general intent to design rules based on the classification of claims, rather than creditors, as secured, and to ensure that the holders of such claims do "not have [their] collateral eroded by delay" (H.R. Rep. 95-595, 95th Cong., 1st Sess. 181 (1977)).

It is true that several court of appeals cases decided under the pre-Code regime, when there was no statutory provision addressed to post-petition interest, had ruled, on the basis of equitable principles, that such interest was available only on claims oversecured by consensual liens, and thus would not be available on a claim secured by a mechanic's lien or on a government claim secured by a tax lien. But there is no reason to believe that Congress intended to codify those decisions in Section 506(b). The justifications that were given in those cases for distinguishing between nonconsensual and consensual liens have been substantially undermined by changing commercial practices. Consensual liens today are no longer restricted to a specific asset, but often extend to virtually all of a debtor's assets and therefore cannot be distinguished from tax liens on that ground. And the changes made by the Federal Tax Lien Act of 1966, Pub. L. No. 89-719, 80 Stat. 1125, substantially improve the availability to creditors of notice of federal tax liens and thereby help ameliorate the concern that other creditors will be unwittingly disadvantaged by the payment of interest on claims secured by tax liens.



Thus, it is highly questionable whether "equitable principle[s]" (Pet. App. 6a) today would support a distinction between consensual and nonconsensual liens, and there is certainly no reason to adhere to such a distinction in the face of a directly contrary statutory provision. The Bankruptcy Code was designed to be a comprehensive revision of the bankruptcy laws in order to modernize them in accordance with changes in the economic and legal landscape. Because of the changes in the premises that underlay the asserted justifications for the pre-Code distinction between consensual and nonconsensual liens, it is to be expected that Congress in 1978 would have regarded that aspect of prior law as a prime candidate for revision, not codification.

Finally, to the extent that a "specific" expression of congressional intent is needed to enact a departure from pre-Code law (see *Midlantic Nat'l Bank* v. *New Jersey Dep't of Envtl. Protection*, 474 U.S. 494, 501 (1986)), that standard is surely met here. The plain meaning of Section 506(b) constitutes a "specific provision in the text of the statute" (*United Savings Ass'n* v. *Timbers of Inwood Forest Associates, Ltd.*, No. 86-1602 (Jan. 20, 1988), slip op. 13) indicating an intent to change the pre-Code rule. When the statute is specifically directed to the subject of that rule and it was a central subject of the bankruptcy revision, the absence of an express confirmation in the legislative history of an intent to change pre-Code law provides no reason to doubt that the plain meaning of the statute, uncontradicted by the legislative history, reflects congressional intent.

## ARGUMENT

### SECTION 506(b) OF THE BANKRUPTCY CODE ALLOWS THE HOLDER OF ANY OVERSECURED CLAIM TO RECEIVE POST-PETITION INTEREST

In 1978, Congress enacted a new Bankruptcy Code as a comprehensive revision of the Nation's bankruptcy laws. The new Code made many significant changes in the law as it had developed under the Bankruptcy Act of 1898. Among other things, the new Code sought to define creditors' rights more explicitly than had the old Bankruptcy Act. Section 506 of the Code is the general section that governs the definition and treatment of secured claims. Section 506(b) specifically describes the amounts that may be received by a creditor who holds an "oversecured" claim, *i.e.*, a claim secured by property the value of which exceeds the amount of the claim and the necessary administrative costs incurred by the trustee in connection with preserving or disposing of the property. Section 506(b) provides that the holder of an oversecured claim shall be allowed to recover "interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose."

As the Fourth Circuit held in *In re Best Repair Co.*, 789 F.2d 1080 (1986), the text of Section 506(b) plainly states that the holder of an oversecured claim is entitled to receive post-petition interest on that claim. Accordingly, in this case, where it was stipulated that the value of the property subject to the federal tax lien exceeds the amount of the government's claim for delinquent taxes together with any necessary administrative costs and post-petition interest, Section 506(b) is directly applicable and provides that the government shall be allowed to receive post-petition interest on its oversecured claim. The court of appeals below, however, held to the contrary. The court



found that the judicially-created rule under the old Bankruptcy Act, which was based on "equitable principle[s]" (Pet. App. 6a), would not have permitted the government to recover post-petition interest on a claim secured by a federal tax lien because the government had not bargained to secure the interest by means of a contract with the debtor. Because Congress in 1978 did not express an intent in the legislative history to change the law that had developed in the courts of appeals on this point, the court ruled that it would not construe Section 506(b) to change the prior judicially-created rule. Instead, the court held that Section 506(b) should be construed to codify that prior rule—by applying the qualifying phrase "provided for under the agreement under which such claim arose" to the express statutory allowance of interest. Thus, the court held that Section 506(b) allows the holders of oversecured claims to recover post-petition interest only when the lien securing the claim was one created in a contract with the debtor.

The court of appeals below clearly erred in reaching this conclusion. There is no reason to reject the plain import of the text of Section 506(b) in favor of the strained reading suggested by the court of appeals. The Bankruptcy Code was intended as a comprehensive revision of prior law, and therefore the apparent meaning of its provisions should not be disregarded simply because applying that plain meaning would lead to a departure from a prior rule created by the courts of appeals at a time when there was no statutory provision explicitly addressing the issue. That is particularly true where, as here, the factors that formed the primary basis for the prior judge-made rule are no longer significant because of changes in the law and in lending practices. It is precisely because of changes like these in the legal and commercial landscape that Congress

found it necessary to embark on a major project to modernize the bankruptcy laws in a comprehensive fashion and thereby eliminate old doctrines that were not responsive to current conditions. In the absence of any evidence that the plain meaning of the language of the new Code deliberately chosen by Congress does not reflect its intent, disregarding that logical interpretation, in favor of principles developed by the courts under the bankruptcy system that Congress discarded as obsolete, undermines Congress's goals and purposes in overhauling the bankruptcy laws.

### A. The Text Of Section 506(b) Plainly Provides That The Holder Of Any Oversecured Claim Is Entitled To Receive Post-Petition Interest

#### 1. *The statutory background*

The enactment of the Bankruptcy Code in 1978 was the culmination of almost 10 years of study and investigation by Congress directed to the goal of comprehensively revising the Nation's bankruptcy laws. The 1978 legislation made significant changes in both the substantive and procedural law of bankruptcy. See *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 52-53 (1982). "The major purpose" of the legislation was "the modernization of the bankruptcy laws." H.R. Rep. 95-595, 95th Cong., 1st Sess. 3 (1977). As Congress explained in the legislative history, "[t]he substantive law of bankruptcy and the current bankruptcy system was designed in 1898, in the horse and buggy era of consumer and commercial credit, and was last overhauled in 1938, nearly 40 years ago" (*ibid.* (footnote omitted)). See also S. Rep. 95-989, 95th Cong., 2d Sess. 1 (1978).

The modernization of the bankruptcy laws in 1978 was designed to address both debtors' and creditors' rights. Congress noted that the new Code "codifies creditors'



rights more clearly than the case law"; specifically, it "defines the protections to which a secured creditor is entitled, and the means through which the court may grant that protection." H.R. Rep. 95-595, *supra,* at 4-5 (footnote omitted). As described in the legislative history, "[o]ne of the more significant changes from current law [was] the treatment of secured creditors and secured claims," namely, "distinguish[ing] between secured and unsecured claims, rather than between secured and unsecured creditors" (*id.* at 180 (footnote omitted)). To that end, Congress determined that the amount of the claim and the value of the property securing it must be compared. If the latter exceeds the former, the claim is oversecured and the creditor must be protected for the full value of his claim; if the amount of the claim exceeds the value of the property securing it, however, then the claim is secured only to the extent of the value of the property and the balance is treated as an unsecured claim. See 11 U.S.C. 506(a); see generally H.R. Rep. 95-595, *supra,* at 181.

Section 506, the provision at issue here, is titled "Determination of secured status" and is "the basic Code provision governing the determination of the secured status of allowed claims" (3 *Collier on Bankruptcy* ¶ 506.01, at 506-2 (L. King 15th ed. 1988)). Section 506 reflects this major change in the bankruptcy system towards treatment of creditors' rights in terms of classifying claims, rather than creditors, as secured, and it directly addresses some of the questions of creditors' rights that had been left to judicially-created "equitable principle[s]" (Pet. App. 6a) under the old Bankruptcy Act. Section 506(a) defines the amount of the secured creditor's allowed secured claim as limited by the value of the creditor's interest in the estate's property that is subject to the lien. Section 506(b) provides that, when a claim is oversecured, "there shall be allowed to the holder of such claim, interest on such claim,

and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose."[2] Section 506(c) provides that the trustee may recover from property securing an allowed claim reasonable expenses of preserving or disposing of the property for the creditor's benefit; these expenses are considered in determining whether the claim is oversecured under Section 506(b). And Section 506(d) provides the general rule, with certain exceptions, that a lien securing a claim is void if the claim is disallowed.

### 2. *The plain terms of Section 506(b) confer upon the holder of any oversecured claim the right to receive post-petition interest*

The issue presented here is whether the holder of an oversecured claim, in this case the government, is entitled to post-petition interest on the claim. Resolution of this issue is directly governed by Section 506(b), which, in the words of this Court, "defines * * * the conditions of [a secured creditor's] receiving postpetition interest" (*United Savings Ass'n* v. *Timbers of Inwood Forest Associates, Ltd.*, No. 86-1602 (Jan. 20, 1988), slip op. 5). And the text of Section 506(b) provides a clear answer to that question because its plain language, its grammatical structure, and its context all indicate that the holders of all oversecured claims are entitled to receive post-petition interest.

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[2] The word "for" in the final phrase of Section 506(b) was added by Section 448(a) of the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, Tit. III, 98 Stat. 374. The original statutory language in the 1978 enactment was "provided under the agreement under which such claim arose." This 1984 amendment was described in the legislative history as a "stylistic change." S. Rep. 98-65, 98th Cong., 1st Sess. 79 (1983); see 3 *Collier on Bankruptcy* ¶ 506.03, at 506-14 (L. King 15th ed. 1988).



Section 506(b) first defines the class of claims to which it applies, namely, claims that are "oversecured," which means that the value of the property constituting the security exceeds the amount of the claim and the recoverable costs of preserving the property (§ 506(c)). Section 506(b) then describes the additional payments that the holder of such a claim is entitled to receive, namely, "interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose." The natural reading of the provision is that it permits all holders of oversecured claims to collect post-petition interest and, in addition, reasonable fees and costs provided for in the agreement giving rise to the claim. The latter portion of the provision thus sets up two distinct categories of payments to which the holder of the claim is entitled—post-petition interest, which is unqualified, and other fees, costs, and charges, which are qualified by the requirements that the payments be "reasonable" and that they be provided for in the agreement under which the claim arose.

Analysis of the grammatical structure of the provision supports this natural reading of the statute. The authorization to pay interest on the claim appears designed to stand independently; it is separated from the remaining portion of the statute both by a comma and by the conjunctive phrase "and any." The comma and the conjunctive phrase together act to separate the phrase "interest on such claim" as one that can stand alone and to introduce a second category of payments allowed to the holders of oversecured claims, namely, "reasonable fees, costs, or charges provided for under the agreement under which such claim arose." See *In re Best Repair Co.*, 789 F.2d 1080, 1082 (4th Cir. 1986). This grammatical structure is at odds with the court of appeals' apparent reading of the

statute—namely, that the final "provided for under the agreement" clause not only qualfies the "reasonable fees, costs, and charges" language, but also qualifies the allowance of interest (see Pet. App. 7a-9a). In the words of the Fourth Circuit in *Best Repair,* the interpretation adopted by the court of appeals here "strains the plain meaning of the language and grammar of the provision" (789 F.2d at 1082).

Indeed, the particular manner of drafting used by Congress at the end of Section 506(b) is a common one that has such a well-established meaning that it is generally regarded as rising to the level of a "maxim" of statutory construction. The "doctrine of the last antecedent" provides that "relative and qualifying words, phrases, and clauses are to be applied to the words or phrase immediately preceding, and are not to be construed as extending to or including others more remote" (*Quindlen* v. *Prudential Insurance Co.,* 482 F.2d 876, 878 (5th Cir. 1973)). See generally 2A C. Sands, *Sutherland Statutory Construction* § 47.33, at 245 (4th ed. 1984). This rule had been variously described as "a fundamental tool of statutory construction" (*United States* v. *Ven-Fuel, Inc.,* 758 F.2d 741, 751 (1st Cir. 1985)) and as "one of the simplest canons of statutory construction" (*United States ex rel. Santarelli* v. *Hughes,* 116 F.2d 613, 616 (3d Cir. 1940) (internal quotation marks omitted)), and it is universally recognized as a significant indicator of legislative intent when construing a statute containing a qualifying phrase.[3] The doctrine of

[3] See, *e.g., Contrans, Inc.* v. *Ryder Truck Rental, Inc.,* 836 F.2d 163, 167-168 (3d Cir. 1987); *United States* v. *Correa,* 750 F.2d 1475, 1481 n.10 (11th Cir. 1985); *People of Illinois* v. *Consolidated Rail Corp.,* 589 F.2d 1327, 1332 (7th Cir. 1978), cert. denied, 442 U.S. 942 (1979); *Azure* v. *Morton,* 514 F.2d 897, 900 (9th Cir. 1975); *Mandina* v. *United States,* 472 F.2d 1110, 1112 (8th Cir.), cert. denied, 412 U.S. 907 (1973); *United States* v. *Pritchett,* 470 F.2d 455, 459 & n.9 (D.C. Cir. 1972). See also *FTC* v. *Mandel Bros.,* 359 U.S. 385, 389-390 (1959).



the last antecedent thus confirms that the natural reading of Section 506(b) is that the "provided for under the agreement" clause qualifies only the second category of payments allowed under the provision, namely, "reasonable fees, costs, or charges." The construction of Section 506(b) adopted by the court of appeals, by contrast, requires a strained reading of the statute because the drafters obviously separated interest from, rather than linked it with, the other allowed payments, and there is no indication that Congress intended to treat the two categories of payments the same in all particulars.[4]

As unlikely as the court of appeals' reading appears when one focuses on the language of Section 506(b), that reading becomes completely untenable when the provision is considered in its context in the Bankruptcy Code. Under the court of appeals' construction, *all* of the payments that Section 506(b) allows to holders of oversecured claims are ones provided for in the agreement under which the claim arose. Thus, Section 506(b) would have no application whatsoever to claims that are not secured by a lien created by agreement, *i.e.,* it would apply only to consensual liens. But the context in which Section 506(b) appears hardly indicates that the entire subsection was designed to be limited to a particular type of secured claim. Section 506 is the general section governing the determination of secured status, and each of its other subsections plainly applies to

[4] If the qualifying phrase is set off by itself with a comma, that is often regarded as an indication that the legislature intended that it not be tied to the immediately preceding phrase, but instead should also qualify earlier antecedents. See 2A C. Sands, *Sutherland Statutory Construction* § 47.33, at 245 (4th ed. 1984); *Bingham, Ltd.* v. *United States,* 724 F.2d 921, 926 n.3 (11th Cir. 1984). This technique was not used, however, in drafting Section 506(b).

all types of secured claims.[5] It is therefore quite incongruous to conclude that Section 506(b), which uses the same general terminology as the other subsections, was intended to apply only to consensual liens, not to all secured claims. Congress likely would have placed the provision elsewhere if it had intended to limit its application in that manner.

Moreover, if Congress had intended to limit the effect of Section 506(b) to consensual liens, it almost surely would have drafted it in a very different fashion. The concept of distinguishing consensual liens from other liens for certain purposes was one with which the drafters of the Bankruptcy Code were well familiar. The Code uses a specific term of art to represent what the court of appeals called consensual liens; a "security interest" is defined as a "lien created by an agreement" (11 U.S.C. (Supp. IV) 101(45)). When Congress wanted to restrict the application of a particular provision of the Bankruptcy Code to such liens, it routinely employed the term "security interest" in those provisions. See, *e.g.*, 11 U.S.C. (& Supp. IV) 362(b)(12) and (13), 363(a), 522(f)(2), 547(c)(3)-(5), 552, 752(c), 1110(a), 1168(a), 1322(b)(2). By the same token, the Code repeatedly makes express reference to special types of liens, such as "judicial liens" and "tax liens," when they are singled out for special treatment.[6]

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[5] The general applicablility of Section 506 to all types of secured claims is illustrated by the rejection, with the explanation that it was "not necessary," of a proposed amendment to Section 506(d) that would have explicitly stated that tax liens are included within its scope. See 124 Cong. Rec. 34014 (1978) (statement of Sen. DeConcini); *id.* at 32414-32415 (statement of Rep. Edwards).

[6] A "judicial lien" is defined as a "lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding" (11 U.S.C. (101(27)). The term is used in several provisions where Congress specified separate treatment for such liens. See 11 U.S.C. (& Supp. IV) 522(f)(1), 544(a)(1), 547(d) and (e)(1)(B). "[S]tatutory liens" are defined as liens "arising solely by force of a statute on specified



Thus, it is exceedingly unlikely that Congress would have drafted Section 506(b) in the manner that it did if its intent was to limit the allowance of post-petition interest to the holders of consensual liens, but deny interest recovery to the holders of judicial and statutory liens. In sum, as the Fourth Circuit concluded in *Best Repair*, "the natural meaning of [Congress's] chosen words is to permit post-petition interest on nonconsensual oversecured claims" (789 F.2d at 1082 (footnote omitted)).[7]

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circumstances or conditions, or lien[s] of distress for rent, whether or not statutory, but does not include security interest or judicial lien, whether or not such interest or lien is provided by or is dependent on a statute and whether or not such interest or lien is made fully effective by statute" (11 U.S.C. (Supp. IV) 101(47)). These liens are singled out by the Code for special treatment in some instances. See 11 U.S.C. (& Supp. IV) 545, 547(c)(6), 724(d). In addition, Congress used the term "tax lien" when it meant to specify special treatment solely for tax liens. See 11 U.S.C. (& Supp. IV) 522(c)(2)(C)(i), 724(b)(1)-(5).

[7] Most bankruptcy courts have reached the same result as the court of appeals in *Best Repair, i.e.*, permitting the holder of any unsecured claim to recover post-petition interest. These courts have considered tax liens, both state and federal (see, *e.g.*, *In re Brandenburg*, 71 Bankr. 719 (Bankr. D.S.D. 1987); *In re Busone*, 71 Bankr. 201 (Bankr. E.D.N.Y. 1987); *In re Gilliland*, 67 Bankr. 410 (Bankr. N.D. Tex. 1986); *In re Hoffman*, 28 Bankr. 503, 508 (Bankr. D. Md. 1983); contra, *In re Nevada Environmental Landfill*, 81 Bankr. 55 (Bankr. D. Nev. 1987); *In re Granite Lumber Co.*, 63 Bankr. 466 (Bankr. Mont. 1986); *In re Venable*, 48 Bankr. 853 (Bankr. S.D.N.Y. 1985)), and private nonconsensual lienholders, such as judicial and mechanic's lien claimants (see, *e.g.*, *In re Charter Co.*, 63 Bankr. 568 (Bankr. M.D. Fla. 1986); *In re Romano*, 51 Bankr. 813 (Bankr. M.D. Fla. 1985); *In re Morrissey*, 37 Bankr. 571 (Bankr. E.D. Va. 1984); *In re Bormes*, 14 Bankr. 895 (Bankr. D.S.D. 1981); see also *In re Loveridge Machine & Tool Co.*, 36 Bankr. 159, 162 (Bankr. D. Utah 1983); contra, *In re Dan-Ver Enterprises*, 67 Bankr. 951 (Bankr. W.D. Pa. 1986); *In re Trent*, 42 Bankr. 279 (Bankr. W.D. Va. 1984)). One other court of appeals and a leading commentator, however, have

### B. There Is No Basis For Concluding That The Plain Meaning Of Section 506(b) Does Not Represent The Intent Of Congress And Therefore No Reason For Construing The Section To Depart From That Plain Meaning

The basic rule of statutory construction is that the plain meaning of a statute should be followed, except in the "rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters." *Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982). See also, *e.g.*, *Randall* v. *Loftsgaarden,* No. 85-519 (July 2, 1986), slip op. 8; *United States* v. *Clark,* 454 U.S. 555, 560 (1982); *United States* v. *Turkette,* 452 U.S. 576, 580 (1981). This is not one of those rare cases. On the contrary, the court of appeals departed from the apparent meaning of the statutory language without any substantial basis for believing that the plain meaning did not reflect the intention of Congress.

#### 1. *The policies and legislative history of the Bankruptcy Code are fully consistent with Congressional intent to allow post-petition interest on all oversecured claims*

There is nothing inherently unreasonable in giving effect to the plain terms of Section 506(b) and allowing post-petition interest to the holders of claims that are oversecured by nonconsensual liens. Such a rule simply grants equal treatment to all secured claims with respect to post-petition interest. That approach is in accord with the broad congressional purpose of designing rules based on the classification of *claims* as secured or unsecured and

taken the position that Section 506(b) codifies pre-Code law and distinguishes between consensual and nonconsensual liens for purposes of receiving post-petition interest. See *In re Newbury Cafe, Inc.*, 841 F.2d 20 (1st Cir. 1988), petition for cert. pending, No. 87-1784; 3 *Collier on Bankruptcy, supra,* ¶ 506.05, at 506-41 to 506-44.



with the recognition by Congress that, once a claim is found to be secured, the "creditor is entitled to realize his claim, and not have his collateral eroded by delay" (H.R. Rep. 95-595, *supra,* at 181). Thus, there is no reason apparent on the face of the statute for doubting that allowance of post-petition interest to all holders of oversecured claims is in furtherance of Congress's intent.

The legislative history of Section 506(b) similarly gives no reason to doubt the plain meaning of the text; indeed, to the extent the legislative history bears on the matter at all, it generally supports the proposition that post-petition interest is available to all holders of oversecured claims. The portion of Section 506(b) allowing "interest on such claim" to oversecured creditors was contained in both the House and Senate versions of the bankruptcy reform legislation that was ultimately enacted by Congress. See H.R. 6, 95th Cong., 1st Sess. (1977); H.R. 8200, 95th Cong., 1st Sess. (1977); S. 2266, 95th Cong., 2d Sess. (1978); see generally 3 *Collier on Bankruptcy, supra,* ¶ 506.03, at 506-07 to 506-12. Because the final version of the statute contained the same language as that introduced in both the House and Senate bills, there were no changes in the course of the legislative process that could shed any light on the meaning of the allowance of interest. Moreover, neither the committee reports nor the statements by the managers of the legislation discuss the question of post-petition interest at all. See H.R. Rep. 95-595, *supra,* at 356; S. Rep. 95-989, *supra,* at 68; 124 Cong. Rec. 32398 (1978) (statement of Rep. Edwards); 124 Cong. Rec. 33997 (1978) (statement of Sen. DeConcini).[8] Thus, the legislative history does not bear directly upon the question of post-petition interest.

[8] Because of the expedited schedule under which the Senate and House versions were reconciled before the passage of the Bankruptcy Act of 1978, there was no formal conference, and a conference report

The final portion of Section 506(b), however, the segment dealing with "reasonable fees, costs, or charges," was changed during the drafting of the 1978 bankruptcy legislation and was the subject of some discussion in the committee reports. The original version of the bill introduced in the House in January 1977 referred to "fees, costs, or charges," but did not restrict those payments to reasonable ones. See H.R. 6, 95th Cong., 1st Sess. (1977). The later version that was introduced in the House and reported out of committee in September 1977 added the "reasonable" limitation, but that restriction was appended only to the final portion of the subsection to modify "fees, costs, or charges" (see H.R. 8200, 95th Cong., 1st Sess. (1977)), and the bill was eventually enacted in that form. See generally 3 *Collier on Bankruptcy, supra,* ¶ 506.03, at 506-7 to 506-8. This history suggests that Congress did not regard interest as linked to the other payments addressed in Section 506(b), but instead viewed them as two distinct categories. And it is logical to conclude that, just as the reasonableness limitation was designed to apply only to the second, non-interest, category of payments, so too the limiting "provided for under the agreement" clause was intended to apply only to the second category of payments, which is consistent with the manner in which Congress drafted Section 506(b). In short, there is nothing in the

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was not issued. Instead, the differences between the two versions were reconciled by the managers of the two bills, Rep. Edwards and Sen. DeConcini, and the explanation of the compromise is contained in statements made on the floor of each house by those two legislators. See generally Klee, *Legislative History of the New Bankruptcy Law,* 28 De Paul L. Rev. 941 (1979).



legislative history to indicate that the plain meaning of Section 506(b) does not reflect the intent of Congress.[9]

***2. The fact that the plain meaning of Section 506(b) deviates from a judge-made rule created under the old Bankruptcy Act in the absence of an applicable statutory provison provides no basis for doubting that the plain meaning reflects the intent of Congress***

The court of appeals based its strained reading of Section 506(b) almost entirely on the fact that applying the plain meaning would deviate from a line of court of appeals cases decided under the old Bankruptcy Act. At the outset, we note that the court of appeals' approach turns

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[9] The history of Section 506(b) involved a dispute over one issue that does not directly bear on the interest question, namely, whether recovery of the payments authorized thereunder depends upon state law. See generally *Unsecured Creditors' Committee* v. *Walter E. Heller & Co.*, 768 F.2d 580, 582-585 (4th Cir. 1985). Prior to the enactment of the 1978 legislation, state law governed the enforceability of attorney's fee agreements between oversecured creditors and bankruptcy debtors, and therefore an attorney's fee recovery under such an agreement might have been denied for failure to comply with some state law requirement, such as notice. See, *e.g., ITT-Industrial Credit Co.* v. *Hughes*, 594 F.2d 384, 387 (4th Cir. 1979). The House Ways and Means Committee amended the House bill before it was reported to the floor to include in Section 506(b) the qualifying phrase "to the extent collectible under applicable law" (see H.R. 8200, 95th Cong., 1st Sess. (1977)). The Senate bill contained no such language, and the Senate version emerged in the statute that was enacted. The managers explained that the House language had been rejected and that a security agreement providing for attorneys' fees will be enforceable "notwithstanding contrary law" (124 Cong. Rec. 32398 (1978) (statement of Rep. Edwards); 124 Cong. Rec. 33997 (1978) (statement of Sen. DeConcini)).

It is significant to note that the House Committee amendment that was ultimately rejected had inserted the state law language into Section 506(b) *before* the language allowing interest; the bill provided that "there shall be allowed to the holder of such claim, to the extent collectible under applicable law, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose" (H.R. 8200, *supra, reprinted in* 3

on its head the ordinary approach to statutory construction. The court did not find itself forced to look to judicially-created law under an obsolete statutory scheme because it concluded that Section 506(b) of the Code was undecipherable on its face. On the contrary, the court did not appear to dispute that Section 506(b) has a natural meaning, namely, that all holders of oversecured claims are entitled to recover post-petition interest. Rather, it was only in light of its review of pre-Code law that the court of appeals "discovered" that the language of Section 506(b) "is not unambiguous but is actually subject to more than one reasonable interpretation" (Pet. App. 11a). In sum, while it would have been unobjectionable for the court of appeals to examine pre-Code law "in order to better understand the context in which [Section 506(b)] was drafted and therefore the language itself" (Pet. App. 4a-5a), that is not what the court did. Instead, its reliance on pre-Code law amounts to an "effort to circumvent the plain meaning of the statute by creating an ambiguity where none exists" (*Escondido Mutual Water Co.* v. *La Jolla Band of Mission Indians,* 466 U.S. 765, 781 (1984)). Once the court of appeals examined pre-Code law, it decided that Section 506(b) must be construed to codify that law, without giving any further consideration to the plain import of the statutory language.

In fact, there is no reason whatsoever to believe that Congress intended to codify pre-Code law in Section 506(b), and the existence of a difference between that pre-Code law and the new rule established by the plain mean-

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*Collier on Bankruptcy, supra,* ¶ 506.03, at 506-8). Thus, it is apparent that the drafters of Section 506(b) were fully capable of making a qualifying phrase applicable both to interest and to other payments if they so desired, and therefore even this tidbit of legislative history supports the natural reading of Section 506(b) that was rejected by the court of appeals.



ing of S[illegible]tion 506(b) does not indicate that the latter is at odds with Congress's intent. The Bankruptcy Act of 1898, as amended, had no provision specifically addressing the types of additional charges, such as interest, that had to be allowed on secured claims. That issue therefore became the subject of judicially-created rules. The general rule was that the running of interest ceased when the petition in bankruptcy was filed (see, *e.g., City of New York* v. *Saper,* 336 U.S. 328, 337-338 (1949); *Vanston Bondholders Protective Committee* v. *Green,* 329 U.S. 156, 163 (1946)), but the courts of appeals generally recognized an exception to that rule when the claim was oversecured and therefore the value of the security was sufficient to satisfy both the claim and the post-petition interest. At the same time, several courts of appeals refused to apply this exception to nonconsensual liens, such as tax liens, arguing that post-petition interest should be available only to the holder of a consensual lien, where the creditor had bargained for security with respect to interest. See *In re Kerber Packing Co.,* 276 F.2d 245 (7th Cir. 1960); *United States* v. *Bass,* 271 F.2d 129 (9th Cir. 1959); *United States* v. *Harrington,* 269 F.2d 719, 724 (4th Cir. 1959); see also *In re Boston & Maine Corp.,* 719 F.2d 493 (1st Cir. 1983), cert. denied, 466 U.S. 938 (1984) (construing pre-Code law).[10]

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[10] The *Harrington* case does not truly endorse the distinction between consensual and nonconsensual liens that the Sixth Circuit read into Section 506(b). In fact, the court of appeals in *Harrington* expressed the view that an exception from the general rule against post-petition interest should not be recognized for any type of claim, even one oversecured by a consensual lien (269 F.2d at 722-723); that view, of course, has indisputably been rejected by Congress in Section 506(b). The court of appeals in *Harrington*, however, did add that, to the extent such an exception had been recognized by some courts, the exception should not be extended to the case of a nonconsensual lien

The court of appeals clearly erred in concluding that Congress intended to codify these cases in Section 506(b) and create a distinction between nonconsensual and consensual liens for purposes of recovery of post-petition interest. First, it is something of an exaggeration to characterize these cases as establishing a "rule" that could appropriately be codified. In relying upon equitable principles, this Court had stated that—in the absence, of course, of an applicable statute—"the touchstone of each decision on allowance of interest in bankruptcy, receivership and reorganization has been a balance of equities between creditor and creditor or between creditors and the debtor" (*Vanston Bondholders Protective Committee* v. *Green,* 329 U.S. at 165). Accordingly, the pre-Code principles governing post-petition interest were not regarded as "rigid doctrinal categories," but rather as "flexible guidelines" to be considered "in light of the nature of each claim and the equities of the case before it" (*In re Boston & Maine Corp.,* 719 F.2d at 496). Second, and more significantly, changes in commercial lending practices and in the law governing federal tax liens have almost completely undermined the reasons that had been advanced to support the pre-Code distinction between consensual and nonconsensual liens. Thus, to the extent Congress focused its attention at all on this pre-Code distinction, it would be expected to have regarded it as a prime candidate for revision, not codification.

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(269 F.2d at 723-724). The Sixth Circuit also cited *United States* v. *Mighell,* 273 F.2d 682 (10th Cir. 1959), but that case is inapposite. In *Mighell,* as the court of appeals there specifically noted, the government was not attempting to invoke any of the recognized exceptions to the rule against allowing post-petition interest out of the assets of the bankruptcy estate (see *id.* at 684 & n.2). Rather, the government was arguing that interest secured by a tax lien was not dischargeable and could be collected directly from the debtor.



One of the main reasons given in the pre-Code cases to justify the disparate treatment of consensual and nonconsensual liens was that the latter, especially in the case of tax liens, typically attached to all of the debtor's property, whereas a lien held by a private consensual creditor typically attached to a single asset. See Pet. App. 7a; *In re Kerber Packing Co.,* 276 F.2d at 247; *United States* v. *Bass,* 271 F.2d at 131; *United States* v. *Harrington,* 269 F.2d at 724. Whatever the merit of that justification when it was first advanced, its factual premise is not accurate under modern commercial lending practices. Today private lienholders do not necessarily limit their security to a single asset; indeed, it is not uncommon for consensual lienholders to secure their loans by obtaining a lien on virtually every asset owned by the debtor. See, *e.g., United States* v. *Security Industrial Bank,* 459 U.S. 70, 71 (1982); *Wegner* v. *Grunewaldt,* 821 F.2d 1317, 1319 (8th Cir. 1987); *Coral Petroleum, Inc.* v. *Banque Paribas-London,* 797 F.2d 1351, 1353 (5th Cir. 1986). Congress was well aware of this aspect of modern commercial lending practice when it enacted the 1978 bankruptcy legislation; for example, the House Report specifically noted that, "[f]requently, creditors lending money to a consumer debtor take a security interest in all of the debtor's belongings" (H.R. Rep. 95-595, *supra,* at 127).[11] Thus, the asserted difference between general and specific liens no longer provided justification in 1978 for a distinction between consensual and nonconsensual liens, and there was no reason for Congress to wish to codify that pre-Code distinction.

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[11] Indeed, concern over the effect of these types of blanket liens held by private consensual lienholders upon household goods gave rise to a special provision in the Bankruptcy Code directed at them. See 11 U.S.C. 522 (f)(2); *United States* v. *Security Industrial Bank, supra.*

The other difference that was frequently cited to iustify the distinction between consensual and nonconsensual liens was the fact that in the former case the security for the interest had been "bargained for" by the creditor and debtor. See *In re Kerber Packing Co.*, 276 F.2d at 247; *United States* v. *Harrington*, 269 F.2d at 724. The purported significance of this distinction appears to have been that it would be inequitable not to allow the creditor the benefit of his bargain, including interest, but, in the absence of such a bargain, it would be inequitable to award interest at the expense of the unsecured creditors. Like the changes in commercial lending practices, however, changes in the rules governing federal tax liens have undermined the view that equitable principles weigh against permitting the government to recover post-petition interest that is allowed to a private secured creditor. The Federal Tax Lien Act of 1966, Pub. L. No. 89-719, 80 Stat. 1125, significantly changed the provisions for filing notices of federal tax liens in order "to increase the likelihood that creditors, generally, will receive notice as to taxpayers' standing with the Government" (S. Rep. 1708, 89th Cong., 2d Sess. 10 (1966)). See generally 26 U.S.C. 6323. These changes operate to assist unsecured creditors who previously might have been unavoidably disadvantaged by the payment of interest to the government because it enables them to protect themselves by determining whether notices of federal tax liens have been filed before deciding whether to extend credit to the debtor or whether to insist upon security.

Moreover, as Congress recognized in 1978 (see generally H.R. Rep. 95-595, *supra*, at 189-193), the government is, in important respects, less able to protect its position than a private creditor. As an involuntary creditor, it lacks the power to prevent further extensions of "credit" (in the form of unpaid taxes), nor can it easily enforce collec-



tion.[12] Finally, it is not apparent why it is equitable to enforce a private creditor's insistence on the payment of interest, but not to allow such interest to the government, when Congress has generally imposed liability for interest as part of the obligation for repayment by a taxpayer of money he has "borrowed" from the government by failing to pay his taxes on time. Thus, under modern practices, equitable principles lend little support to the distinction that had been recognized between consensual and nonconsensual liens in the pre-Code cases upon which the court of appeals relied.[13]

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[12] The House Report explained (H.R. Rep. 95-595, *supra*, at 193):

> [I]t is a frequent occurrence that the business will stop paying its taxes before it stops paying its other creditors, because the officers of the business know that detection of nonpayment is more difficult for the taxing authority than it is for a supplier or lender, and that an unpaid supplier quickly stops shipping goods, though an unpaid taxing authority is usually unable to take collection action for months.

[13] In its 1983 decision construing pre-Code law, *In re Boston & Maine Corp.*, *supra*, the First Circuit suggested another rationale for the old distinction between consensual and nonconsensual liens, but this justification is also insubstantial. The First Circuit characterized the payment of interest to the United States on delinquent taxes as an "enforcement device" and reasoned that it was inequitable to assist tax enforcement in that manner when the interest payment would come at the expense of lower priority creditors who are powerless to cause the prompt payment of taxes by the debtor. See 719 F.2d at 497. First, the premise of this rationale is erroneous. Liability for interest, which is designed to compensate the government for the loss of the use of money that should have been paid to the Treasury, cannot be equated with an enforcement device, such as a penalty. The interest rates on delinquent taxes are now based on short-term federal obligations (see 26 U.S.C. (& Supp. III) 1274(d) and 6621), and generally have always been more favorable than any rate at which the debtor could hope to borrow money on the open market; thus, it can hardly be regarded as "punitive." See, *e.g.*, *In re Levitt House, Inc.*, 72 Bankr. 18, 20 (Bankr. E.D.N.Y. 1987). Moreover, even penalties, which are sepa-

In sum, the pre-Code decisional law on post-petition interest provides no basis for doubting that the plain meaning of Section 506(b) reflects the intent of Congress. Those cases arose at a time when the courts understood the "fundamental" governing principle to be that post-petition interest is "normally denie[d]" (*United States* v. *Bass,* 271 F.2d at 132). Changes in commercial lending practices and tax lien statutes have undermined the rationale for such a restrictive rule, however, and Congress, in the course of a massive revision and modernization of the bankruptcy laws, has now enacted a statute specifically entitling oversecured creditors to such interest. That statute appears on its face to apply to all oversecured creditors, and there is no reason to believe that Congress, in using such general language, intended to codify pre-Code law and cover only "those exceptional situations" (*In re Boston & Maine Corp.,* 719 F.2d at 498) where the interest was provided for under a security agreement.

3. ***The absence of any legislative history specifically demonstrating an intent to change pre-Code decisional law provides no basis for departing from the plain meaning of Section 506(b)***

The court of appeals justified its heavy reliance on pre-Code law by referring to what it termed a "rule of statutory construction enunciated in" this Court's deci-

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rately treated under the Bankruptcy Code, are sometimes accorded priority status over the claims of some private creditors (see 11 U.S.C. (Supp. IV) 503(b)(1)(C), 507(a)(7)(G)). Second, the "enforcement device" argument proves too much because its logic suggests that the government should not even be able to collect *pre*-petition interest, which is clearly contrary to 11 U.S.C. (Supp. IV) 502(b)(2). Third, and most important, the court of appeals' suggested rationale furnishes no basis for distinguishing between consensual and nonconsensual liens. Just as general creditors are powerless to force the debtor to pay his taxes promptly, they are also powerless to prevent him from entering agreements to incur secured debt at high rates of interest. Yet the rule adopted by the court of appeals here would require the payment of post-petition interest in the latter situation, to the detriment of the general creditors.



sions in *Kelly* v. *Robinson,* No. 85-1033 (Nov. 12, 1986), and *Midlantic Nat'l Bank* v. *New Jersey Dep't of Envtl. Protection,* 474 U.S. 494 (1986) (Pet. App. 10a). The Court stated in *Midlantic* that, when "Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific" (474 U.S. at 501). The court of appeals below found that Congress did not act explicitly enough in enacting Section 506(b) to meet the test of making its intent "specific" and therefore pre-Code law must be deemed to have been continued in effect; the court appears to have reached this conclusion by relying principally, if not entirely, upon the fact that the legislative history of Section 506(b) does not state an intent to abrogate pre-Code law (see Pet. App. 12a). The court of appeals seriously erred in ascribing such significance to the absence of any legislative history discussing pre-Code law.

It is clear that *Midlantic* and *Kelly* do not establish a general rule requiring explicit statements in the legislative history to enact a new bankruptcy provision that deviates from pre-Code law. That would be inconsistent with the most basic principles of statutory construction. While legislative history ordinarily is useful in helping to construe a statute, it is not indispensable to determining a statute's meaning. As this Court has noted in construing the Federal Rules of Evidence, "[i]t would be extraordinary to require legislative history to *confirm* the plain meaning of a rule" (*Bourjaily* v. *United States,* No. 85-6725 (June 23, 1987), slip op. 6 (emphasis in original)), and the same is surely true of a statute. Plainly, "it would be a strange canon of statutory construction that would require Congress to state in committee reports or elsewhere in its deliberations that which is obvious on the face of a

statute" (*Harrison* v. *PPG Industries, Inc.*, 446 U.S. 578, 592 (1980)).[14]

More generally, the court of appeals erred in finding that *Midlantic* and *Kelly* establish any general rule of construction that is applicable to this case and that casts any doubt upon the proposition that the plain meaning of Section 506(b) reflects the intent of Congress. The concern that this Court evinced in those cases for specificity on the part of Congress was a product of the particular context of those cases and has little bearing on the question presented here. Both *Midlantic* and *Kelly* involved the question of the impact of a general bankruptcy provision on important issues and policies outside the bankruptcy context. In both cases, it was not apparent that Congress had considered these nonbankruptcy effects in the course of the bankruptcy revision, and therefore the Court had reason to doubt whether Congress intended to depart from pre-Code decisional law. Those cases have little bearing here, however, where the Bankruptcy Code provision is specifically addressed to the issue at hand, and that issue is a core bankruptcy matter.

In *Midlantic*, the Court held that the Bankruptcy Code's provision generally authorizing the trustee to abandon property (11 U.S.C. (Supp. IV) 554(a)) did not give him the right to abandon property in contravention of state or

[14] The court of appeals' excessive preoccupation with the legislative history, rather than the text of the statute, is illustrated by its tangential discussion of the attorney's fees portion of Section 506(b). The court there mistakenly characterized the final statements on the floor of the House and Senate by the managers of the legislation as addressed to the differences between the language of the House and Senate *Reports* (see Pet. App. 12a n.11). These statements, of course, were in fact designed to explain the reconciliation of the differences in the *statutory text* in the House and Senate bills. See note 9, *supra*.



local laws designed to protect public health or safety. The Court explained that "[n]either the Court nor Congress has granted a trustee in bankruptcy powers that would lend support to a right to abandon property in contravention of state or local laws designed to protect public health or safety" (474 U.S. at 502). Indeed, the Court stated, Congress has "repeatedly expressed its legislative determination that the trustee is not to have *carte blanche* to ignore nonbankruptcy law," especially when issues of public health and safety are involved (*ibid.*). The Court also stated that there had been well-recognized restrictions on the trustee's abandonment power when Congress enacted Section 554(a) (474 U.S. at 500-501). Characterizing Section 554 as a "codif[ication of] the judicially developed rule of abandonment," the Court then stated that it was a normal rule of statutory construction, particularly in bankruptcy codifications, that Congress makes its intent specific if it intends to change the interpretation of a judicially-created concept (474 U.S. at 501). Finding that the exemption from state law sought by the trustee was an "extraordinary" one (*ibid.*), the Court concluded that an intent to establish such an exemption would have been expressly manifested by Congress.

In *Kelly*, the Court held that the Bankruptcy Code did not provide for the discharge of restitution obligations to crime victims that had been ordered by the state's criminal justice system. Citing *Midlantic*, the Court noted that the 1978 Code provision, which did not on its face make such obligations nondischargeable, was enacted "against the background of an established judicial exception to discharge for criminal sentences, including restitution orders" (*Kelly*, slip op. 9-10). The Court explained that this judicial exception had been established in the face of relatively "clear statutory language" (slip op. 8) that would have rendered such debts dischargeable, and therefore it

was reasonable to read the 1978 statute as embodying the same exception, rather than silently clashing with the "deep conviction that federal bankruptcy courts should not invalidate the results of state criminal proceedings" (*id.* at 10).

Thus, the Court's reliance on pre-Code law in both *Midlantic* and *Kelly* was triggered by special circumstances that are wholly absent here. Those cases involved the interaction between bankruptcy law and nonbankruptcy law, and a clash between competing policies and interests in the two areas. Specifically, the Court was faced with determining the effect of a fairly general bankruptcy law provision upon a question implicating important government interests unrelated to bankruptcy—state health and safety laws and the continued effectiveness of requirements imposed in state criminal proceedings. There was no reason for this Court to believe that these consequences were the focus of congressional attention during the drafting of the Bankruptcy Code.

Moreover, the Court found that the consequences of assuming that Congress intended to change previously-established law were quite significant. In *Midlantic,* the Court noted that changing the prior rule would have conferred an "extraordinary" power on the trustee to ignore the requirements of state health and safety laws—a power that appeared to be contrary to legislative determinations expressed repeatedly in the past by Congress (474 U.S. at 501-502). Similarly, in *Kelly,* the Court characterized the reading of the statute that would have made restitution obligations dischargeable as " 'so wasteful, so inimical to purposes previously deemed important, and so likely to arouse public outrage,' " that it was almost inconceivable that Congress would have enacted such a rule without a more explicit indication of intent (slip op. 13-14, quoting



*TVA* v. *Hill,* 437 U.S. 153, 209 (1978) (Powell, J., dissenting)). Thus, in both *Midlantic* and *Kelly* the Court did not depart from the literal meaning of the statute standing alone solely because the text pointed to a rule different from pre-Code decisional law; rather, the Court sought a more specific indication of congressional intent to change preexisting law because several factors led the Court to believe that it was exceedingly unlikely that Congress had intended to change that law.

This case, by contrast, involves a core matter in bankruptcy—the rights of secured creditors—that was a central subject of the 1978 revision of the bankruptcy laws. Moreover, the provision involved here is specifically directed at the question of recovery of post-petition items arising from oversecured claims. Thus, there is no reason to assume that the effect of the plain terms of Section 506(b) on the rights of the holders of oversecured claims is something that was not specifically contemplated by Congress. Nor is the result of applying those plain terms "extraordinary" or "inimical" to important public purposes; as we have shown (pages 20-21, 27-30, *supra*), there is every reason to expect the Congress that comprehensively revised the bankruptcy laws in 1978 to have done away with the pre-Code judicially-created distinction between consensual and nonconsensual liens. Accordingly, the conclusions in *Midlantic* and *Kelly* that pre-Code law had survived in the particular circumstances of those cases simply do not establish any general presumption applicable here that the Bankruptcy Code embodies pre-Code decisional law.[15]

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[15] The presumption that Section 506(b) should be construed to codify the pre-Code distinction between consensual and nonconsensual liens for purposes of post-petition interest is further undermined by the fact that other portions of the provision clearly do not codify pre-Code law. As we have noted, the pre-Code rule was that attorney's

In sum, the explicit terms of Section 506(b)—a statutory provision specifically directed to the resolution of the question presented—are plainly sufficient to meet any requirement that a "specific" congressional intention to abrogate pre-Code law be shown. At least where the question is a core bankruptcy matter, there is no reason to doubt that the natural meaning of the text of the statute reflects congressional intent, even in the absence of any specific legislative history. See *United Savings Ass'n* v. *Timbers of Inwood Forest Associates, Ltd.*, slip op. 13 (major change in existing rules would not likely have been made by the Bankruptcy Code "without specific provision in the text of the statute" (citing *Kelly* v. *Robinson, supra*)); see also *Palmer* v. *Massachusetts*, 308 U.S. 79, 85 (1939).[16] The absence of an explicit rejection of pre-Code

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fees could be recovered only in accordance with state law. The courts have uniformly held, however, that this rule was abrogated by Section 506(b). See *In re Hudson Shipbuilders, Inc.*, 794 F.2d 1051, 1056 (5th Cir. 1986); *In re 268, Ltd.*, 789 F.2d 674, 675-677 (9th Cir. 1986); *Unsecured Creditors' Committee* v. *Walter E. Heller & Co., supra*; see also *Mack Financial Corp.* v. *Ireson*, 789 F.2d 1083, 1084 (4th Cir. 1986) (noting that Congress did not intend to codify every detail of pre-Code law concerning the allowance of reasonable charges and instead disputes must be resolved by reference to the statutory text). The holding that pre-Code law was altered in this respect is supported by the statement of the managers reconciling the House and Senate versions, though the Senate Committee Report explaining the language that ultimately was enacted does not state any intent to abrogate pre-Code law. See generally note 9, *supra*.

[16] Indeed, this Court has implicitly recognized that the text of the Bankruptcy Code can be sufficient to show a specific intent to depart from pre-Code law in the absence of any expression of that intent in the legislative history. In *United States* v. *Whiting Pools, Inc.*, 462 U.S. 198 (1983), the Court rejected the government's argument that it did not have to turn over to the estate, under 11 U.S.C. 542(a), property that had been seized by means of a pre-petition tax levy. The Court recognized (462 U.S. at 206 n.13) that pre-Code law had recog-



law in the legislative history of Section 506(b) furnishes no basis for concluding that application of the plain meaning of that provision (uncontradicted by anything in the legislative history) "will produce a result demonstrably at odds with the intentions of its drafters" (*Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. at 571).

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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nized in a Chapter 7 case that the government was not required to turn over property that it had seized by a pre-petition levy because that property was not subject to the bankruptcy court's jurisdiction (see *Phelps* v. *United States*, 421 U.S. 330 (1975)), but it concluded that this previously-established limitation was now "irrelevant because of the expanded jurisdiction of bankruptcy courts under the Bankruptcy Code" (462 U.S. at 210 n.18). Nothing in the Bankruptcy Code or the legislative history, however, had specifically expressed an intent to depart from the rule embodied in *Phelps*. The court nonetheless held that "[t]he Service is bound by § 542(a) to the same extent as any other secured creditor" (462 U.S. at 209).

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No. 87-1043

In The
# Supreme Court of the United States
October Term, 1987

UNITED STATES OF AMERICA,
*Petitioner,*
v.
RON PAIR ENTERPRISES, INC.,
*Respondent.*

## RESPONDENT'S BRIEF

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## QUESTION PRESENTED

Whether Section 506(b) of the Bankruptcy Code entitles a non-consensual lien creditor to receive post-petition interest on an over secured claim in a bankruptcy proceeding.

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No. 87-1043

In The

# Supreme Court of the United States

October Term, 1987

UNITED STATES OF AMERICA,

*Petitioner,*

v.

RON PAIR ENTERPRISES, INC.,

*Respondent.*

## RESPONDENT'S BRIEF

## SUMMARY OF ARGUMENT

The Bankruptcy Court and the Court of Appeals correctly relied on both pre-Code as well as Code cases in interpreting 11 U.S.C. § 506(b). It is clear that 11 U.S.C. § 506(b) is intended to codify pre-Code law prohibiting the payment of post-petition interest on pre-petition non-consensual lien claims. Nothing in the legislative history indicates that 11 U.S.C. § 506(b) was intended to overrule the longstanding prohibition against paying post-petition interest on pre-petition non-consensual lien claims.

There is no "natural reading" of § 506(b), nor does its grammatical structure give it a "plain meaning", as is self-evident from the history of this appeal, the differences of opinion among the Bankruptcy Courts and the split of authority between the Court of Appeals for the Fourth Circuit and the Courts of Appeals for the Sixth and First Circuits.

It is immaterial that many bankruptcy courts have followed the minority line of reasoning among the courts of appeals by permitting the holder of any unsecured claim to recover post-petition interest. Those decisions are wrong. The Supreme Court should not disturb the decision of the Court of Appeals for the Sixth Circuit which was correctly decided.

## ARGUMENT

### A. The Historical Background

To interpret correctly the reach of 11 U.S.C. § 506(b) it is crucial to study those cases which preceded enactment of the Bankruptcy Code and to understand the rationale contained in those cases for denying post-petition interest to the IRS on a pre-petition tax lien claim.

The general rule in bankruptcy and other insolvency proceedings is that interest ceases to run on secured and unsecured claims with the initiation of the proceeding, i.e., the filing of the petition. *Vanston Bondholders Protective Committee v. Green,* 329 U.S. 156 (1946); *City of New York v. Saper,* 336 U.S. 328 (1949); *Sexton v. Dreyfus,* 219 U.S. 339 (1911).

As the Supreme Court in *Thomas v. Western Car Company,* 149 U.S. 95 (1893) explained:

> Exaction of interest, where the power of a debtor to pay even his contractual obligations is suspended by law, has been prohibited because it was considered in the nature of a penalty imposed because of delay in prompt payment—a delay necessitated by law if the courts are properly to preserve and protect the estate for the benefit of all interests involved. . . As a general rule, after property of an insolvent passes into the hands of a receiver or of an assignee in insolvency, interest is not allowed on the claims against the funds. The delay in distribution is the act of the law; it is a necessary incident to the settlement of the estate.

In *City of New York v. Saper, supra,* the Supreme Court held that the general prohibition against the payment of post-petition interest also embraced tax claims in bankruptcy cases.



> The Court of Appeals concluded that by the 1926 amendment and the Chandler Act, Congress assimilated taxes to other debts for all purposes, including denial of post-bankruptcy interest. We think this is a sound and logical interpretation of the Act after those amendments to 64(a) and 57(n). Considered in conjunction with the general rule against post-bankruptcy interest as well as 63's limitations of interest on other claims to date of bankruptcy, they compel our conclusions, already stated, that the *statute as amended did not contemplate any exception in favor of tax claims.* (Emphasis added).

336 U.S. at 338.

*Saper's* ban on post-petition interest for tax claims had been extended to Chapter X Reorganizations, *United States v. Edens,* 189 F.2d 876, 877 (4th Cir. 1951), *aff'd per curiam,* 342 U.S. 912 (1952); Chapter XI Arrangements, *Commonwealth of Massachusetts v. Thompson,* 190 F.2d 10, 10-11 (1st Cir. 1951), *cert. denied,* 342 U.S. 918 (1952); *United States v. General Engineering and Manufacturing Co.,* 188 F.2d 80, 81-83 (8th Cir. 1951), *aff'd per curiam,* 342 U.S. 912 (1952) and Section 77 railroad reorganizations, *In re New York, New Haven and Hartford Railroad Co.,* 304 F.Supp. 1121, 1129-32 (D. Conn. 1969).

Following *Saper* the Government attempted to have the courts confine that ruling to pre-petition tax claims not reduced to liens. Three District Courts were not so persuaded. *In re Industrial Machine & Supply Co.,* 112 F.Supp. 261 (W.D. Pa. 1953); *In re Lykens Hosiery Mills,* 141 F.Supp. 895 (S.D. N.Y. 1956) and *In re Came-*

*ron,* 166 F.Supp. 400 (S.D. Cal. 1958), *aff'd U.S. v. Bass,* 271 F.2d 129 (9th Cir. 1959). *Contra, In re Parchem,* 166 F.Supp. 724 (D. Minn. 1958); *In re Ross Nursing Home,* 2 B.R. 496 (Bankr. E.D. N.Y. 1980).

As Judge Sobeloff pointed out in *United States v. Harrington,* 269 F.2d 719, 721 (4th Cir. 1959), "The opinion of the Supreme Court in the *Saper* case seems to have been intended to put the question to rest once and for all."

> Mr. Justice Jackson, speaking for this Court, pointed out that:
>
> "* * *. More than forty years ago Mr. Justice Holmes wrote for this Court that the rule stopping interest at bankruptcy had then been followed for more than a century and a half. He said the rule was not a matter of legislative command or statutory construction, but, rather a fundamental principle of the English bankruptcy system which we copied. *Sexton v. Dreyfus,* 219 U.S. 339, 344 [31 S.Ct. 256, 257]. Our present statute contains no provision expressly repudiating that principle or allowing an exception in favor of tax claims. Every logical implication from relevant provisions is to the contrary.* * *" *City of New York v. Saper, supra,* 336 U.S. at Page 330, 69 S.Ct. at Page 555.

Notwithstanding the clear broad ban on post-petition interest, non-consensual lien creditors have created three exceptions to the general rule with respect to accruing interest post-petition on pre-petition secured claims. In insolvency cases the argued interest may accrue:

(1) when the bankrupt ultimately proves to be solvent;

(2) the security held by the creditor as collateral produces income after the filing of the petition; and



(3) the collateral is sufficient to pay interest as well as the principal amount of the claim. *In re Walsh Construction, Inc.,* 669 F.2d 1325, 1330 (9th Cir. 1982); *In re Kerber Packing Company,* 276 F.2d 245, 246-47 (7th Cir. 1960); *United States v. Bass,* 271 F.2d 129, 130 (9th Cir. 1959); *In re Macomb Trailer Coach, Inc.,* 200 F.2d 611, 611, 613 (6th Cir. 1952), *cert. denied,* 345 U.S. 958 (1953), and *United States v. Harrington, supra* noting that the Supreme Court did not appear to have recognized the third general exception.

However, five Courts of Appeal in cases decided under the Bankruptcy Act determined that the IRS does not fall within the third exception which permits payment of post-petition interest on a pre-petition tax lien claim. Exception three does not apply to non-consensual liens, such as tax liens. *Kerber Packing, supra; United States v. Bass, supra; United States v. Harrington, supra; United States v. Mighell,* 273 F.2d 682 (10th Cir. 1959); and *In re Boston and Maine Corp.,* 719 F.2d 493 (1st Cir. 1983).

Prior to the enactment of the Bankruptcy Code no Federal Court of Appeals had decided otherwise. Although the Fourth Circuit took a different stance in *In re Best Repair Company, Inc.,* 789 F.2d 1080 (4th Cir. 1987), that Court did not correctly examine the Code language nor did it properly examine the analysis and rationale contained in the pre-Code cases.

As previously stated the IRS grounds its request for post-petition interest on 11 U.S.C. § 506(b):

> To the extent that an allowed secured claim is secured by property the value of which, after any re-

> covery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs or charges provided for under the agreement under which such claim arose.

A careful reading of § 506(b) leads one correctly to conclude that it is a codification of existing law mandating the general prohibition against allowing post-petition interest on an allowed secured claim filed in bankruptcy. *In re Churchfield,* 62 B.R. 339, *recon. den.,* 66 B.R. 30 (E.D. Mich. 1986); 3 *Collier on Bankruptcy,* ¶ 506.05 at 506-38 n. 1 (15th ed. 1988); *contra, In re Loveridge Machine & Tool Co.,* 36 B.R. 159 (D. Ut. 1983). The third exception is that "the security (collateral) is sufficient to pay interest as well as the principal amount of the claim." As perceptively pointed out by Bankruptcy Judge Spector in *Churchfield, supra* at 658 (Bankr. E.D. Mich. 1986), "Before there was a Bankruptcy Code there was a Bankruptcy Act." Accordingly, the analysis set forth in the pre-Code cases is controlling and must govern here.

The Seventh Circuit in *In re Kerber Packing Company,* 276 F.2d 245 (7th Cir. 1960), distinguished the Government's secured status as the result of a statutory lien from those creditors who held consensual liens.

> The third exception to the rule that interest does not accrue subsequent to filing provides protection to the creditor in his security which on liquidation produces a sufficient amount to satisfy the encumbrance and interest thereon. In the case of a mortgage or deed of trust, an *encumbrance is placed on the property voluntarily by the debtor as security for his deed after agreement with the creditor.* By this act the debtor authorizes not only the satisfaction of the deed



> out of the sale of the particular property but agrees to the payment of any deficiency that might arise after the sale and that other property he may own may be subjected to execution for payment of a deficiency judgment.
>
> This exception has been recognized by the courts to the extent of allowing post-bankruptcy interest to *creditors who are deemed to have bargained for collateral to secure not only the principal obligation but the interest thereon as well.* Usually the allowance has been in cases involving either mortgages, deeds of trust, bonds secured by collateral or a vendor's lien on a particular chattel and involving liens upon specific property of the bankrupt growing out of a contract between him and the creditor. (Emphasis added).

276 F.2d at 247. *Kerber* denied the IRS' request for post-petition interest in accord with the decisions of the Fourth, Ninth and Tenth Circuits.

*In re Newbury Cafe, Inc.,* 841 F.2d 20 (1st Cir. 1988) (pet. for cert. filed April 28, 1988) was correctly decided. *Best Repair Co.,* 789 F.2d 1080 (4th Cir. 1987) is wrongly decided. It completely ignores the pre-Code cases on this issue and ascribes undue import to the word "any", which is no more than mere surplusage. There is nothing to evidence a hidden Congressional intent to change existing law.

The First Circuit noted that the Fourth Circuit conceded that the legislative history is wholly inconclusive. *In re Newbury Cafe, Inc.,* 841 F.2d at 22 citing *Best Repair Co.,* 789 F.2d at 1082.

> In light of the uniform and extensive pre-Code law, that void is a serious obstacle for [the oversecured non-consensual lien creditor seeking post-petition in-

terest] . . . . In *Midlantic National Bank v. New Jersey Department of Environmental Protection,* 474 U.S. 494, 106 S.Ct. 755, 88 L.Ed. 2d 859 (1986), the Court said, at 501,

> The normal rule of statutory construction is that if Congress intends to change the interpretation of a judicially created concept, it makes that intent specific [citation omitted]. The Court has followed this rule with particular care in construing the scope of bankruptcy codifications.

*In re Newbury Cafe, Inc., supra,* at 22.

Section 506(b) is not clear, is not susceptible of only one interpretation, and does not have one "natural meaning".

As the Court of Appeals for the Ninth Circuit held in *United States v. Bass,*

> The principal reason usually assigned for not including liened tax claims within the third exception allowing post-bankruptcy interest to secured creditors is that, as set out in *United States v. Harrington, supra*: ". . . when the creditor extended credit, he *relied* upon the particular security given as collateral to secure both the principal of the debt and interest until payment and, if the collateral is sufficient to pay him, the contract between the parties ought not to be abrogated by bankruptcy. *This rationale has no application to tax liens.*" (Emphasis added.)

271 F.2d at 131.

In *United States v. Bass* the government sought to limit the holding of *Saper* to unliened tax claims, arguing that there was no basis to equate liened and unliened claims with respect to disallowance of post-bankruptcy interest. The Ninth Circuit held otherwise:



> In view of the fundamental principle which normally denies post-bankruptcy interest, as discussed in *City of New York v. Saper, supra,* we do not think extension of this exception is justified.
>
> Collection of the public revenue is a favored object, but we think today it is no more favored than that of protecting remaining creditors from the law's delay to the extent of denying post-bankruptcy interest on tax claims, liened or not.

*Bass* at 132.

*See* also *United States v. Mighell, supra,* wherein the court, concurring with *Harrington* and *Bass,* stated in *dicta* that post-bankruptcy interest on liened tax claims must be denied.

The First Circuit has also addressed the issue of allowing interest during the gap period on pre-petition secured tax liens. In *In re Boston and Maine Corp.,* 719 F.2d 493 (1st Cir. 1983), the Debtor's Reorganization Plan provided for cash payment in full for taxes accruing prior to the filing of the reorganization petition, as well as for taxes accruing during the reorganization period. As in the instant case, however, the Debtor's Plan did not provide for post-petition interest on a pre-petition tax lien. The court provided an extensive historical analysis of the general rule that pre-petition claims do not accrue interest after the filing of the petition, noting that the United States Supreme Court in *Saper* confirmed a general prohibition against the payment of post-petition interest on pre-petition tax claims in bankruptcy cases. Listing the three exceptions developed by the Federal courts to permit the payment of post-petition interest on pre-petition se-

cured claims, the court explained that the exceptions were not:

> . . . [r]igid, doctrinal categories. Rather, they are flexible guidelines which have been developed by the courts in the exercise of their equitable powers in insolvency proceedings. The reorganization court must consider whether to grant post-petition interest, not as an abstract matter, but in light of the nature of each claim and the equities of the case before it. [Citations deleted]. At all times the reorganization court must be guided by the basic equitable principle announced in *Vanston*:
>
> It is manifest that the touchstone of each decision on allowance of interest in bankruptcy, receivership and reorganization has been a balance of equities between creditor and creditor or between creditors and the debtor. [Citation deleted].

719 F.2d at 496.

The Court disagreed with the City of Cambridge's contention that having perfected its lien prior to the debtor's filing of its bankruptcy petition the City became a secured creditor in the amount of its tax lien claim and enjoyed the same status as all other secured creditors.

> Those cases in which courts have applied the third exception, permitting postpetition interest to accrue, have generally involved mortgages, trust deeds, pledges or conditional sales contracts. In all of these circumstances, the creditor's security arises from a voluntarily executed agreement between the debtor and the creditor. The two parties have bargained with reference to a specific security with the expectation that the creditor may sell this security and realize the entire amount of the outstanding obligation, including interest accrued to the date of payment. [Citation omitted]. To deny such a creditor post-petition interest, when the amount of the security is sufficient to cover both the principal and interest due, would undermine the faith of lenders in the efficacy of credit arrangements. Such a loss of confidence could result in a curtailing of the free flow of capital in our economy. [Citation omitted]. Thus, granting post-petition interest to mortgagees and other holders of contractual liens satisfies the expectations of the parties and strikes an equitable balance between the creditors and the debtors.



719 F.2d at 497.

The First Circuit then noted that the Supreme Court had never ruled on the applicability of the third exception, granting post-petition interest when there is sufficient secured collateral, to tax liens. A meaningful distinction can be drawn between contractual liens, such as a mortgage or deed of trust, and statutory liens, such as the City of Cambridge's perfected tax lien.

> A statutory lien depends for its existence solely on a legislative act creating the lien in specified circumstances. No bargaining takes place between the debtor-taxpayer and the taxing entity which is granted a lien; the lien cannot be classified as voluntary.
>
> Further, the payment of the interest, which is secured by the lien, is not contemplated by the parties at the beginning of each tax year. Rather, the imposition of interest on unpaid taxes is more in the nature of an enforcement device assuring the collection of delinquent taxes. In the context of an insolvency proceeding, to grant the taxing entity postpetition interest on its tax lien would impose the "enforcement device" not on the insolvent debtor, but on those lower priority creditors whose claims will go unpaid. To penalize these creditors for the bankrupt's inability to pay its taxes on time violates all notions of equity. [Citations deleted].

719 F.2d at 497

### B. The Punctuation Problem

The IRS contends that the pre-Code cases disallowing post-petition interest on pre-petition non-consensual tax lien claims are now of no import and that the wording of 11 U.S.C. § 506(b) reverses those cases. It is apparent that it is not the wording of Section 506(b) upon which the IRS hangs its argument but rather the punctuation, in particular the placement of two commas, which at best are unnecessary and at worst ungrammatical.

But for the two commas which separate the phrase "interest on such claims" from the rest of § 506(b), the IRS would have to concede that interest on the claim would be due only if provided for *under the agreement under which such claim arose.*

Interpreting legislation by punctuation is at best unreliable and at worst seriously misleading. As the Sixth Circuit stated in *Egyptian Supply Co. v. Boyd,* 117 F.2d 608, 611 (6th Cir. 1941):

> It is a well settled rule that punctuation is a fallible standard of the meaning of a statute and is resorted to only as a last resort in construing doubtful statutes. Punctuation marks are no part of an Act and to determine legislative intent, punctuation will be disregarded or the phrase repunctuated if that be necessary in order to arrive at the natural meaning of the words employed. *United States v. Shreveport Grain & Elevator Company,* 287 U.S. 77, 83, 53 S.Ct. 42, 77 L.Ed. 175; *Joy v. St. Louis,* 138 U.S. 1, 32, 11 S.Ct. 243, 251, 34 L.Ed. 843.

Section 506(b) contains seven commas. Nothing indicates that by placing two of those commas around the phrase "interest on such claim", Congress intended to



divorce the payment of interest from the threshold requirement that the over-secured claim arise from an "agreement" and thus be consensual. It appears the drafters of § 506(b) used these two commas to break up an overly long sentence, thus creating the illusion of a parenthetical expression where one does not exist. To make the sentence gramatically correct, the commas should be deleted. The two commas in question create an ambiguity where there is none.

*Collier,* a leading Bankruptcy commentator, addressed the sentence structure of § 506(b) as follows:

> The sentence structure of 506(b) contains an ambiguity that has created some confusion over the applicable rate for computing interest to be allowed under 506(b). The phrase "interest on such claim" is separated by a comma from the phrase "and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose." *Such separation apparently derived from the need the drafters felt to make clear that interest was to be allowed only to the extent it accrued on the claim (as opposed to any other amount). However, such separation raises the question of whether the phrase "provided for under the agreement under which such claim arose" applies to "interest on such claim" or only to "any reasonable fees, costs or charges."*

Notwithstanding the misplaced comma or commas, post-petition interest should be computed at the rate provided in the agreement under which the claim arose, the so-called "contract rate" of interest. The great majority of courts which have considered the issue have utilized the contract rate, and this result appears consistent with prior case law. The legislative history offers little guidance because, while evidencing a Congressional intent to codify pre-existing case law with respect to entitlement to reasonable

> fees, costs, or charges provided under the agreement under which the claim arose, it does not refer to interest.

3 *Collier on Bankruptcy* § 506.05 at 506-43 (15th ed. 1988). (Emphasis added).

Thus, *Collier* posits that the comma was actually inserted to separate the word "claim" from "any reasonable fees, costs, or charges." Without the comma, the Section may have been read to require interest not only on the claim but also on fees, costs and charges.

*Collier* further points out in Footnote 10 that, in as much as this grammatical ambiguity was present in all prior draft versions of 11 U.S.C. § 506(b) starting with H.R. 6, it cannot be explained as the drafters' desire to divorce interest from the "reasonable" qualifier which appears only in later versions. Noting *Loveridge Machine and Tool Company Inc.*, 36 B.R. 159 (Bankr. Utah 1983), *Collier* further states:

> [b]ased on the assumption that 11 U.S.C. § 506(b) allows post-petition interest on non-consensual lien claims, [*Loveridge*] explains the grammatical structure as necessary to provide for situations in which there is no agreement. If one accepts that assumption, *which constitutes the minority view*, that explanation is logical.

3 *Collier* at 506-43, Footnote 10.

A contrary, and incorrect, interpretation of the placement of the commas was made in *In re Best Repair Company, Inc.*, 789 F.2d 1080, 1082 (4th Cir. 1986).

> The phrase "interest on such claim" is set off by commas, and the following phrase is introduced by "and any." The effect of this usage is to make "interest on such claim" a separate and distinct clause to which "provided for under the agreement" does not apply. If Congress had wanted the agreement proviso to limit "interest on such claim" to consensual claims, it could have easily have done so by listing seriatim and in parallel form the different items an over-secured creditor can recover subject to an agreement. Though Congress could have more clearly separated the interest clause from the agreement clause, we think that the natural meaning of its chosen words is to permit post-petition interest on non-consensual over-secured claims.



Confronted with the identical issue now before this Court in *In re Churchfield*, 62 B.R. 339, *recon. den.*, 66 B.R. 30 at 658, Judge Spector respectfully disagreed with the Fourth Circuit's conclusion that § 506(b) contains "plain terms" which compel the result it reached.

> Not being an authority on English grammar punctuation, we find that the words and punctuation of the Statute are hopelessly ambiguous, and so move on to analyze their meaning through examination of legislative intent, which even the Fourth Circuit believed was necessary and appropriate.

*Churchfield, supra* at 658.

The legislative intent clearly did not change existing case law.

The Notes of Committee on the Judiciary, Senate Report No. 95-989 state:

> Subsection (b) *codifies current law* by entitling a creditor with an oversecured claim to any reasonable fees (including attorney's fees), costs, or charges provided under the *agreement under which the claim arose*." (Emphasis added).

This language is repeated in the Legislative Statements found in the Historical and Revision Notes:

> Section 506(b) of the House amendment adopts language contained in the Senate amendment and rejects language contained in H.R. 8200 as passed by the House. *If the security agreement between the parties provides for attorneys' fees*, it will be enforceable under Title 11, notwithstanding contrary law, and is recoverable from the collateral after any recovery under 506(c).

Legislative history does not indicate that by enacting § 506(b) Congress affirmatively intended to change existing law concerning the general prohibition against paying post-petition interest on pre-petition secured claims to include non-consensual tax liens:

> Pre-Bankruptcy Code precedent more strongly supports the latter view (IRS not entitled to post-petition interest on secured tax claim), and there is no evidence in the legislative history of 26 U.S.C. 6621 of Congressional intent to change that result.

3 *Collier on Bankruptcy*, § 506.05, pp. 506-40.

In the face of the confusing commas, § 506(b)'s ambiguity, and the absence of any indication whatsoever that Congress intended, considered, or even contemplated changing the case law which preceded enactment of § 506 (b), pre-Code cases should continue to govern.

The Courts of Appeal for the Sixth and First Circuits correctly rejected the reasoning in *Best Repair, supra* in concluding that the placement of a comma and the inclusion of the words "and any" do not evidence an intention to reject the well-established judicially created



concept. As stated by the Sixth Circuit "the admitted lack of legislative history on this point lends further credence to [its] position. If Congress intended to depart from pre-Code law with respect to only this one portion of Section 506(b), . . . such an intent must be expressed explicitly and not through the ambiguous use of a comma . . . ." *In re Ron Pair Enterprises, Inc.*, 828 F.2d 367 (6th Cir. 1987).

### C. The Post-Code Cases

A number of post-Code cases have either directly or indirectly addressed Section 506(b)'s application to non-consensual secured claims. *In re Newbury Cafe*, 841 F.2d 20 (1st Cir. 1988); *In re Bormes*, 14 B.R. 895 (Bankr. D.S.D. 1981); *In re Brooks*, 24 B.R. 447 (Bankr. D. Kan. 1982); *In re Hernando Appliances, Inc.*, 41 B.R. 24 (Bankr. N.D. Miss. 1983); *Matter of Maimone*, 41 B.R. 974 (Bankr. D. N.J. 1984); *In re Best Repair Co. v. United States of America*, 789 F.2d 1080 (4th Cir. 1987); *In re Henzler Manufacturing Co.*, 55 B.R. 194 (Bankr. N.D. Ohio 1985); *Loveridge Machine & Tool Co., supra; In re Trent*, 42 B.R. 279 (Bankr. W.D. Va. 1984); *In re Angelo Russo*, 63 B.R. 335 (Bankr. D. Mass. 1986); *In re Colegrove*, 771 F.2d 119 (6th Cir. 1985); *In re Churchfield, supra; In re Busman*, 5 B.R. 332 (Bankr. E.D. N.Y. 1980); *In re Stack Steel and Supply Company*, 28 B.R. 151 (Bankr. W.D. Wash. 1983); *In re Samuel and Rose Lee Venable*, 48 B.R. 853 (Bankr. S.D. N.Y. 1985); and *In the Matter of United Refining Company*, — B.R. — (Bankr. S.D. Tx. 1988).

In *In re Stack Steel and Supply Company*, 28 B.R. 151, the court determined that the State of Washington's

properly filed tax lien was not entitled to post-petition interest as the third exception to the general rule is not applicable to tax liens. The rationale of a consensual contractual relationship has no application to tax liens.

Although *In re Samuel and Rose Lee Venable,* 48 B.R. 853, deals with the taxing authority's objection to confirmation of a Chapter 13 Plan, the facts and analysis are clearly applicable. The City of Mount Vernon claimed post-petition interest as an administrative expense tax priority under 11 U.S.C. 507(a)(1) on unpaid pre-petition real estate taxes which were a lien against the real property. Judge Schwartzberg disagreed.

In denying the claim the Court noted that the concept that an over-secured creditor may assert its right to post-petition interest was codified under 11 U.S.C. § 506(b).

> The statutory language expressly makes reference to the requirement that interest, as well as fees, costs or charges, must be "provided for under the agreement under which such claim arose." The necessity for a consensual authority has application to mortgages, trust deeds, pledges or conditional sales contracts where the secured creditor and the debtor have voluntarily bargained with reference to a specific security, including the realization of interest until the date of payment. The courts have permitted post-petition interest in such instances in support of the efficacy of credit arrangements and in furtherance of the expectations of the parties and have denied post-petition interest on statutory liens, which are beyond the area of voluntarily contracted debts. [Citations omitted.]

12 B.C.D. at 1208.



The *Venable* Court remained unpersuaded that *In re Busman,* 5 B.R. 332 (Bankr. E.D. N.Y. 1980) required post-petition interest on pre-petition tax liens.

> Accordingly, the City must draw strength for its post-petition interest claim on unpaid pre-petition taxes from sources other than 11 U.S.C. 506(b) *because this section does not support the post-petition payment of interest on noncontractual statutory tax liens.* (Emphasis added.)

The United States asserts that an undefined majority of the post-Code cases may support the IRS' position. However, it is elementary that, it is not the number of post-Code cases, but rather the correct interpretation of § 506(b), which must govern. Further, a majority of the Courts of Appeal have decided this in accord with the long standing rule prohibiting post-petition interest to non-consensual lien creditors. Moreover, the split of opinion as to the correct interpretation of § 506(b), supports the Debtor's position that at best § 506(b) is ambiguous. The ambiguity and the absence of any indication that Congress intended to change pre-Code law, means the pre-Code cases must govern.

### D. The Best Repair Decision

The Fourth Circuit's *Best Repair* decision, promulgated less than a week before the District Court heard oral arguments on the instant case, does not mandate a different result. *Best Repair's* finding that the "plain meaning" of § 506(b) permits the IRS, or any other oversecured non-consensual lien creditor, to accrue post-petition interest on its pre-petition lien is simply wrong. *Best Repair* appears to have completely ignored the historical analysis of the pre-Code case law. This is surprising in

light of the well reasoned District Court opinion from which the appeal was taken. *In re Best Repair Company, Inc.,* 789 F.2d 1080 (4th Cir. 1987). Noting the "confusing comma" issue, the District Court characterized its review of the entire legislative history of 11 U.S.C. § 506(b) as inconclusive. Recognizing that § 506(b) is ambiguous and reviewing the split in the case law on its interpretation, Judge Doumar reversed the Bankruptcy Court's allowance of post-petition interest to the IRS.

> The wisdom of the *Harrington* case remains vital today, notwithstanding the passage of 506(b). Faced with the recent and ambiguous subsection, 11 U.S.C. 506(b) on the one hand, and a prior Fourth Circuit decision squarely on point, *United States v. Harrington, supra,* this court will follow the Fourth Circuit case which rejected post-petition interest on non-consensual, oversecured tax claims. The court construes 506(b) as authorizing such post-petition interest only if bargained for under a consensual agreement between the creditors and the debtor.

50 B.R. at 388.

In *United Savings Association of Texas v. Timbers of Inwood Forest Associates, Ltd.,* 108 S.Ct. 626, 98 L.Ed.2d 740, 56 USLW 4107 (January 20, 1988) this Court rejected claims of undersecured creditors for post-petition interest on their claims. This Court stated that § 506(b) merely codifies pre-Code bankruptcy law. Acknowledging the pre-Code rule denying such interest, the Supreme Court stated that had Congress nevertheless meant to give undersecured creditors interest on the value of their collateral it would have said so plainly in § 506(b). *See United Savings Association of Texas v. Timbers of Inwood Forest Associates, Ltd.,* 108 S.Ct. 626 (January 20, 1988).



As the Supreme Court stated in *Timbers of Inwood*:

> Such a major change in the existing rules would not likely have been made without specific provision in the text of the statute, c.f. *Kelly v. Robinson,* 479 U.S. 36 (1987); it is most improbable that it would have been made without even any mention in the legislative history.

*United Savings Association of Texas,* 56 U.S.L.W. at 4109.

As the Supreme Court ruled in *Kelly v. Robinson,* 479 U.S. 36 (1987):

> Just last Term we declined to hold that the new Bankruptcy Code silently abrogated another exception created by courts construing the old Act. In *Midlantic National Bank v. New Jersey Dept. of Environmental Protection,* 474 U.S. 494 (1986), a trustee in bankruptcy asked us to hold that the 1978 Code had implicitly repealed an exception to the trustee's abandonments power . . . . We stated:
>
> "The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific. The Court has followed this rule with particular care in conserving the scope of bankruptcy codification."

The United States filed an *amicus* brief in *Midlantic,* supra. In its brief it stated that "Congress is, of course, presumed to have codified the judge-made law existing at the time of its consideration and enactment of [the Bankruptcy Code provision of issue]." *See Midlantic National Bank,* supra, Brief for the United States as amicus curiae supporting respondents, page 16. Suddenly the United States proffers an inconsistent and diametrically opposed view when it appears to suit it. In fact the United States was correct in *Midlantic,* as this Court found.

In *Matter of United Refining Company,* — B.R. — (Bankr. S.D. Tx. 1988) the Government again failed to convince a court that the Bankruptcy Code had been drafted with the intent to disturb the preexisting rule that non-consensual lien claimants are not entitled to post-petition interest. Bankruptcy Judge Wheless noted the clear, well reasoned decisions of the First and Sixth Circuit Courts of Appeal and stated:

> Basing their decision on the well-founded precept of statutory construction that " . . . if Congress intends for legislation to change the interpretation of the judicially created concept, it makes that intent specific.", the Court found that § 506(b) did not allow post-petition interest to an oversecured non-consensual lien holder (i.e. the DOR). *See Midlantic National Bank v. New Jersey Department of Environmental Protection,* 474 U.S. 494, 501, 106 S.Ct. 755, 88 L.Ed.2d 859 (1986) . . .
>
> In view of the two well-reasoned opinions cited above, this Court finds that the IRS is not entitled to post-petition interest based on 11 U.S.C. § 506(b).

*In the Matter of United Refining Company,* Bankruptcy Case No. 83-03935-H2-5 (Bankr. S.D. Tx. 1988). Respondent is informed that, in its brief *Amicus Curiae* to be filed herein, United Refining will also specifically address individual arguments presented by the United States in its brief.

## SUMMARY

The issue here is whether 11 U.S.C. § 506(b) applies to pre-petition non-consensual tax lien claims so as to permit interest on those claims to continue to accrue after the filing of the bankruptcy petition until confirmation of the Debtor's Plan. Section 506(b) is a codification of the general rule prohibiting such post-petition interest on a pre-petition non-consensual tax lien claim. The Section's legislative history is silent as to how Congress intended to deal with the payment of such interest and there is no indication that congress intended to overrule prior, virtually unanimous, case law on this point. As recognized by the United States Supreme Court, silence is dangerous when one is attempting to overrule judicially created concepts. *Watt v. Alaska,* 451 U.S. 259 (1981). If Congress intends for legislation to change the interpretation of the judicially created concept, it make that intent specific. *Midlantic National Bank v. New Jersey,* 474 U.S. 494 (1986).

## CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

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UNITED STATES OF AMERICA,
*Petitioner,*

v.

RON PAIR ENTERPRISES, INC.,
*Respondent.*

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**On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

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## BRIEF FOR UNITED REFINING COMPANY AS *AMICUS CURIAE* SUPPORTING RESPONDENT

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## BRIEF FOR UNITED REFINING COMPANY AS *AMICUS CURIAE* SUPPORTING RESPONDENT[1]

### INTEREST OF THE *AMICUS CURIAE*

United Refining Company ("United") is a corporation which is presently operating pursuant to a Plan of Reorganization under Chapter 11 of the Bankruptcy Code, confirmed by the Bankruptcy Court in the Southern District of Texas, Case No. 87-03935-H2-5, Letter Decision dated Apr. 22, 1988. In so ruling, the court approved the reasoning of the court below in this case and that of the First Circuit in *In re Newbury Cafe, Inc.*, 841 F.2d 20. The government has appealed the Bankruptcy Court's decision to the district court. United therefore submits this brief *amicus curiae* with the consent of the other parties. This brief responds in the fullest detail that space permits to the argument of the United States in this Court. We thereby avoid duplicating the respondent's brief, which we were permitted to see in draft.

### INTRODUCTION AND SUMMARY OF ARGUMENT

The Bankruptcy Reform Act of 1978 (Pub. L. No. 95-598, 92 Stat. 2549) enacted a new Bankruptcy Code, Title 11 of the U.S. Code. This "comprehensive revision" (U.S. Br. 10) made important changes in the bankruptcy laws, and in other respects, codified existing law. The issue in this case is whether § 506(b) of the new Code changed prior law in order to allow postpetition interest on oversecured claims by holders of nonconsensual liens. To decide that issue, it is necessary first to understand how bankruptcy law dealt with postpetition interest before § 506(b) was enacted.

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[1] Throughout this brief, references to the opinion below will be to the Appendix to the Petition for Certiorari ("Pet."); references to the Brief for the United States in this Court will be cited "U.S. Br.".

*Nicholas* v. *United States*, 384 U.S. 678, 682, stated the general rule:

> It is a well-established principle of American bankruptcy law that in cases of ordinary bankruptcy, the accumulation of interest on claims against a bankrupt estate is suspended as of the date the petition in bankruptcy is filed. *Sexton* v. *Dreyfus*, 219 U.S. 339. That rule, grounded in historical considerations of equity and administrative convenience, was specifically made applicable to the accumulation of interest on claims for taxes by the decision of this Court in *New York* v. *Saper*, 336 U.S. 328.

This Court's decisions "reflect[ed] the broad equitable principle that creditors should not be disadvantaged *vis-a-vis* one another by legal delays attributable solely to the time-consuming procedures inherent in the administration of the bankruptcy laws." 384 U.S. at 683.

As of 1978, this rule was subject to three exceptions, of which the third is immediately pertinent here. Postpetition interest was allowed where the value of the collateral securing the debt was sufficient to pay both the claim and postpetition interest on that claim. As the court below explained, "where the creditor had bargained to become an oversecured creditor, he had an expectation of receiving interest were it necessary to sell the security." Pet. 7a. It was also well established, however, that the exception which allowed postpetition interest to be paid if the claim was oversecured did not apply to claims which were secured by *nonconsensual* liens because the reason underlying the exception did not apply. *Id.*

The general rule denying postpetition interest, and the first and second exceptions are codified in §§ 502(b)(2), 726(a)(5) and 552(b) of the new Code. Section 506(b) codifies the third exception—it unmistakably permits postpetition interest on oversecured claims where such interest is provided for under the agreement. But the government contends here that § 506(b) also *reversed* prior law by allowing postpetition interest also on claims of nonconsensual lienholders—a class which includes federal and state taxing authorities as well as private parties such as judicial and mechanic's lien claimants. In a carefully reasoned opinion, the Court of Appeals correctly rejected the government's position.



I. The government bases its interpretation of § 506(b) on what it repeatedly asserts is the "plain meaning" and "natural reading" of that provision. That "natural reading" rests on the view that the comma and conjunctive phrase ", and any" in § 506(b) separate the phrase "interest on such claim" from the remainder of the provision, "reasonable fees * * * provided for under the agreement under which such claim arose." U.S. Br. 15. This interpretation of ", and any" cannot be squared with the legislative history of § 506(b). An earlier version of that provision allowed to the holder of an oversecured claim *"to the extent collectible under applicable law* interest on such claim, and any reasonable fees, costs, or charges provided under the agreement * * *". H.R. 8200, 95th Cong., 1st Sess. (1977) (emphasis supplied). It is undisputed that the underscored phrase was intended to modify "fees", because its purpose was to subject claims for attorney fees to the limitations of state law. Thus, the comma and conjunction ", and any" did *not* separate the phrase "interest on such claim" from the remainder of the sentence. There is no basis for speculating that ", and any" was intended to assume this separating function when the underscored phrase relating to "applicable law" was eliminated; indeed in explaining the final bill, the managers from both Houses identified only a single change from § 506(b) of the House bill—they had adopted the Senate's view that claims for attorney fees should receive uniform treatment regardless of state law.

More generally, the government's contention that § 506(b) is unambiguous, although its "plain meaning"

rests in part on the presence of a comma, is untenable because this Court has long recognized the unreliability of punctuation in interpreting statutes, and has, where necessary, repunctuated the statute to arrive at the correct interpretation. *E.g.*, *Simpson* v. *United States*, 435 U.S. 6, 11-12 n.6; *United States* v. *Shreveport Grain & Elevator Co.*, 287 U.S. 77, 82-83; *Stephens* v. *Cherokee Nation*, 174 U.S. 445. The government's additional points relating to the text of the statute cannot justify the assertion that § 506(b) is *unambiguous*, since they provide, at most, a basis for *construing* that provision in the government's favor. On examination they fail to advance the government's case even to that limited extent.

II. In *Midlantic National Bank* v. *New Jersey Department of Environmental Protection*, 474 U.S. 494, this Court declared:

> The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific. (Citation omitted.) The Court has followed this rule with particular care in construing the scope of bankruptcy codifications. [474 U.S. at 501.]

This rule of construction was followed in *Kelly* v. *Robinson*, —— U.S. ——, 107 S.Ct. 353, 359-360 (Nov. 12, 1986), and once again in *United Savings* v. *Timbers of Inwood Forest*, 108 S. Ct. 626, 634 (Jan. 20, 1988).

The Court of Appeals followed these precepts in interpreting § 506(b) "as incorporating the third judicially created exception to disallowing postpetition interest on prepetition claims, including the limitations placed on that exception by the various circuit courts of appeals." Pet. 11a. The Court correctly reasoned that "the placement of a comma and the inclusion of the words 'and any' [which it deemed to be "ambiguous"] do not evince an intention to reject the well-established judicially created concept," and that the "admitted lack of legislative history on this point lends further credence to our position." *Id.* 11a-12a.



To accept the government's position, it must be assumed that Congress overrode the equitable considerations which were furthered by the prior law, without leaving a trace of evidence that it was dissatisfied with that law, and apparently wtihout prompting by any of the classes of creditors—public or private—who would be benefitted by the change. Significantly, the Commissioner of Internal Revenue made detailed proposals to Congress but did not urge that the law be revised to allow postpetition interest on federal tax claims or to nonconsensual lienholders generally.

The government attempts to limit the *Midlantic-Kelly* rule of construction to "the particular context of those cases", *viz.* "the question of the impact of a general bankruptcy provision on important issues and policies outside the bankruptcy context," which it seeks to contrast with cases where the "issue is a core bankruptcy matter." U.S. Br. 32. But the effort is in vain: The proffered distinction is contrary to the explicit reasoning in the *Midlantic* and *Kelly* opinions; fails to take account of *United Savings*, which followed *Kelly* in a "core bankruptcy matter"; and is inconsistent with the government's own position in its brief *amicus curiae* in *Midlantic*.

Finally, the government contends that Congress could not have intended to codify the prior law; in this regard, it points to changes in the lending practices of private creditors and to the Federal Tax Lien Act of 1966. As we explain, however, it is quite illogical to suppose that either of these events could have prompted Congress to make the sweeping change in the law for which the government contends—to allow holders of nonconsensual liens to receive postpetition interest. More fundamentally, even if it could be plausibly asserted that intervening events might have caused Congress to reverse the prior rule, the force of the *Midlantic-Kelly* rule of construction would not be overcome. For under that rule, an

intent to make such a change will not be attributed to Congress unless "it makes that intent specific". 474 U.S. at 501.

## ARGUMENT

### I. The Plain Terms of § 506(b) of the Bankruptcy Code Do Not Provide for Postpetition Interest to the Holders of Oversecured Claims in the Absence of an Agreement Providing for Such Interest.

A. Section 506(b) of the Bankruptcy Code ("Code") provides in pertinent part:

> To the extent that an allowed secured claim is secured by property the value of which * * * is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.

The government asserts, and reiterates throughout its brief, that the "plain meaning" and "natural reading" of § 506(b) is that postpetition interest should be available to the holders of any oversecured claim, even if such interest is not provided for in an agreement between the debtor and the lienholder, although pre-Code law allowed such interest only where there was such an agreement. But as Judge Bailey Aldrich wrote in *In re Newbury Cafe, Inc.*,[2] where the same argument was made by the Massachusetts Department of Revenue ("DOR"):

> DOR goes so far as to tell us that the limitation-removal language is "clear and unambiguous." If anything seems clear, it is that that is not so. [841 F.2d at 22.]

In the words of the court below, the government's contention that "Congress intended to depart from pre-Code

[2] 841 F.2d 20 (C.A. 1), Pet. for Cert. pending, No. 87-1784, (hereafter *"Newbury Cafe"*). The Court there approved the Sixth Circuit's analysis in this case, saying that it "needs no elaboration". *Id.* at 22.



law with respect to only this one portion of section 506(b)" depends on "the ambiguous use of a comma and the words 'and any' ". Pet. 12a. The government's argument in this Court confirms that its "natural reading of the statute" depends on acceptance of the meaning which it attributes to ", and any":

> The authorization to pay interest on the claim appears designed to stand independently; it is separated from the remaining portion of the statute both by a comma and by the conjunctive phrase "and any." The comma and the conjunctive phrase together act to separate the phrase "interest on such claim" as one that can stand alone and to introduce a second category of payments allowed to the holders of oversecured claims, namely, "reasonable fees, costs, or charges provided for under the agreement under which such claim arose." [U.S. Br. 15.] [3]

This interpretation of ", and any" cannot be squared with the legislative history of § 506(b)—as we now demonstrate.

B. The fact that the drafters of § 506(b) did *not* intend ", and any" to have the meaning for which the government now contends is revealed by what the government would pass off as a "tidbit of legislative his-

[3] Since this proposed "natural reading" is based on the view that the "comma and the conjunctive phrase *together* act to separate * * *" (*id.*, emphasis added), it is entirely accurate to say that the government "is reduced to pinning its hopes on one, what one court has termed 'capricious,' comma". *Newbury Cafe*, 841 F.2d at 22, quoting *In re Dan-Ver Enters., Inc.*, 67 B.R. 951 (W.D.Pa. 1986). Only at the end of a long footnote which was an array of bankruptcy court decisions does the government acknowledge that the First Circuit "and a leading commentator * * * have taken the position that Section 506(b) codifies pre-Code law * * *". U.S. Br. 19-20, n.7, citing *Newbury Cafe*, and 3 *Collier on Bankruptcy* (L. King, 15th ed. 1988) ¶ 506.05 at 506-41 to 506-44 (hereafter "Collier").

tory". U.S. Br. 23-24, n.9.[4] As the government notes (*id.*), a dispute surfaced during the debate on § 506(b) as to whether claims for attorney fees should be limited by state law or should receive uniform treatment in bankruptcy regardless of state law. The bill originally reported by the House Ways and Means Committee took the former approach. In that version, § 506(b) read as follows:

> To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section is greater than the amount of such claim, there shall be allowed to the holder of such claim, *to the extent collectible under applicable law interest on such claim, and any* reasonable fees, costs, or charges provided under the agreement under which such claim arose. [H.R. 8200, 95th Cong., 1st Sess. (1977), emphasis supplied.][5]

[4] Elsewhere, the government asserts that "to the extent the legislative history bears on the matter at all, it generally supports the proposition that post-petition interest is available to all holders of oversecured claims." U.S. Br. 21. But the references which follow provide no such "support", and the government concludes the same paragraph by saying: "Thus, the legislative history does not bear directly upon the question of post-petition interest." *Id.* We agree with neither of these mutually contradictory statements. Rather, as we discuss in the text, the legislative history does provide evidence that the "grammatical structure" on which the government's "plain meaning" argument rests (*id.* 15) was *not* intended to have the effect which the government ascribes to it.

[5] We have set forth the language of the prior version exactly as it is reproduced in 12 Resnick & Wypyski, *Bankruptcy Reform Act of 1978—A Legislative History* (1979) at 387 (Doc. 41) (hereafter "Leg. Hist."), and in Volume 3 of the Appendix to the Collier treatise at 387. However, a comma appears between "applicable law" and "interest on such claim" at U.S. Br. 23, n.9; this is an accurate quotation from the body of that treatise, ¶ 506.03, at 506-8, but differs from the actual text of the bill.

While neither the presence nor absence of this particular comma would affect our discussion of the legislative history, this discrepancy vividly illustrates that "[t]he presence or absence of a comma, according to the whim of the printer or proof reader, is so nearly



If the drafters had intended by the use of ", and any" to separate the language which precedes that "comma and conjunctive phrase" from the remaining language in the sentence (U.S. Br. 15), § 506(b) of the House bill would not have accomplished its stated objective. For, if that were the effect of ", and any", the qualifying phrase "to the extent collectible under applicable law" would have modified only "interest on such claim". But that phrase was unquestionably intended also to modify "fees"; the legislative history leaves no doubt, and the government correctly states (*id.* 23-24, n.9), that the drafters of that bill sought thereby to limit claims for attorney fees to those permitted by state law.

This evidence from the legislative history compels the conclusion that the original drafters of § 506(b) did not consider it to be natural reading of the grammatical structure that ", and any" erects a wall separating "interest on such claim" from "any reasonable fees, costs, or charges provided for under the agreement under which such claim arose." The government's interpretation of § 506(b) therefore depends on the unspoken assumption that when the qualifying phrase ("to the extent that * * *") was dropped, the remaining ", and any" was intended to assume a separating function which it did not originally perform. There is no basis for surmising that Congress did any such thing; indeed, in explaining the final bill, the managers identified only a single change from § 506(b) of the House version—that dealing with attorney fees as described above. See 124 Cong. Rec. 32398 (1978) (statement of Rep. Edwards); 124 Cong. Rec. 33997 (1978) (statement of Sen. DeConcini).[6] Thus, the government's interpretation of § 506

fortuitous that it is a wholly unsafe aid to statutory interpretation." *Erie R. Co.* v. *United States*, 240 Fed. 28, 32 (C.C.A. 6). See also pp. 10-11, *infra*.

[6] The government proffers an entirely different lesson from the House Committee amendment. Noting that the qualifying phrase concerning "applicable law" was placed "*before* the language allowing interest", it argues that Congress' failure to have done like-

(b) is refuted by the legislative history.[7]

C. The specific history of § 506(b) aside, the government's contention that § 506(b) is unambiguous, although its proposed "plain meaning" rests in part on the presence of a comma, is untenable as a general proposition. And the difficulties with that argument are compounded because it depends not only on the *presence* of the comma after "interest on such claim", but also on the *absence* of a comma before the modifying clause "provided for under the agreement."[8] This Court has long recognized that "[p]unctuation is a most fallible standard by which to interpret a writing; it may be resorted to when all other means fail," *Ewing* v. *Burnet*, 11 Pet. (36 U.S.) 41, 53-54; *Northern Pacific Ry. Co.* v. *United States*, 227 U.S. 355, 360; *Barrett* v. *Van Pelt*, 268 U.S. 85, 91.[9] This Court's wariness about relying upon punctuation as a guide to legislative intent is anchored in the common experience that legislative draftsmen, like individuals generally, often punctuate incorrectly, through either oversight and ignorance. As Judge Aldrich observed in *Newbury Cafe*, *supra*,

> A comma, often a matter of personal style, is a very small hook on which to hang a change in the law of substantial proportions. [841 F.2d at 22.]

Accordingly, the Court has frequently repunctuated statutes in order to arrive at the correct interpretation. *E.g.*, *Simpson* v. *United States*, 435 U.S. 6, 11-12 n.6;[10] *United States* v. *Shreveport Grain & Elevator Co.*, 287 U.S. 77, 82-83, and cases cited *id.*; *Barrett* v. *Van Pelt*, *supra*.

*Stephens* v. *Cherokee Nation*, 174 U.S. 445 ("*Cherokee Nation*"), provides an especially apt illustration of this Court's practice because there is a striking similar-

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wise with the phrase "provided for under the agreement * * *" shows that that phrase was not intended to modify "interest on such claim". U.S. Br. 23-24, n.9, emphasis in original. That argument is at best an *inference* concerning legislative intent, far removed from the proposition on which the government's position depends—that the "plain meaning" of § 506(b) provides for post-petition interest to nonconsensual lienholders. The argument therefore cannot support the position that Congress intended to change the pre-Code law, since such an intent must be made "specific". *Midlantic*, *supra*, 474 U.S. at 501.

Moreover, the proposed inference from the *placement* of the qualifying phrase is entirely unwarranted. The government does not explain why, if Congress wishes to qualify language which appears in two phrases, it would more likely do so by inserting the limiting language *before*, rather than *after*, the phrases which are to be qualified, or show that this is in fact Congress' regular practice.

[7] See also pp. 18-20, *infra*, where we describe further evidence that § 506(b) was not intended to change existing law.

[8] The government observes that, if a comma appeared in § 506(b) before the qualifying phrase "provided for under the agreement", this would be evidence "that the legislature intended that it not be tied to the immediately preceding phrase, but instead should also qualify earlier antecedents" (U.S. Br. 17, n.4)—here, "interest on such claim."



[9] In *Barrett*, the Court said:

> The comma after the word "unloaded" *is not entitled to have any weight as evidence of the legislative intention* as against the considerations supporting the extension of the qualifying effect of the words "by carelessness or negligence" to all claims referred to in the second clause. [268 U.S. at 91, emphasis added.]

[10] In *Simpson*, the Court construed 18 U.S.C. § 2113(d), which provides aggravated penalties for any person who, in the course of committing or attempting to commit bank robbery,

> assaults any person, *or* puts in jeopardy the life of any person *by the use of a dangerous weapon or device* (emphasis added).

This Court held—despite the comma and conjunction (", or")—that

> ". . . In order to give lawful meaning to Congress' enactment of the aggravating elements in 18 U.S.C. § 2113(d), the phrase 'by the use of a dangerous weapon or device' must be read, regardless of punctuation, as modifying both the assault provision and the putting in jeopardy provision." [435 U.S. at 12, n.6, quoting with approval Judge McCree's separate opinion in *United States* v. *Beasley*, 438 F.2d 1279, 1284 (C.A. 6).]

ity between the statute construed there and § 506(b).[11] The statute at issue [12] provided as follows:

> Appeals shall be allowed from the United States courts in the Indian Territory direct to the Supreme Court of the United States to either party,[1] in all citizenship cases, *and* [2] in all cases between either of the Five Civilized Tribes and the United States *involving the constitutionality or validity of any legislation affecting citizenship, or the allotment of lands* * * * [174 U.S. at 479, emphasis and bracketed numbers added.]

The qualifying language emphasized above follows two sets of possible antecedents that are connected by a comma and the conjunction "and". The *Cherokee Nation* Court found this grammatical structure to be "somewhat obscure," and observed that the ambiguity could be removed entirely if the comma were *deleted* between antecedent [1] and antecedent [2], or a comma were *inserted* before the qualifying clause. 174 U.S. at 479-81. The Court held, on the basis of its understanding of the "mind of Congress" in enacting the statute, that the provision should be so repunctuated, thereby making clear that the qualifying language restricted *all* of the possible antecedents. *Id.* This is exactly the result reached by the Court of Appeals in this case in construing § 506(b).

D. In order to buttress its argument from punctuation, the government invokes "the doctrine of the last antecedent", which it would raise to the level of a dogma. U.S. Br. 16. The effort is self-defeating, however, because a rule of *construction* does not reveal the "plain meaning" of statutory language.[13] As the treatise cited

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[11] See also *Simpson*, discussed at p. 11, n.10, *supra*, and *Mor*, discussed at pp. 13-14, *infra*.

[12] Indian Appropriation Act of July 1, 1898, c. 545, 30 Stat. 571, 591.

[13] In the context of § 506(b), the doctrine that "* * * qualifying words, phrases, and clauses are to be applied to the *words or*



by the government on this point cautions, this "rule" is merely "*another aid* to discovery of intent or meaning and is not inflexible and uniformly binding." [14] The fact is that courts often conclude that a word or phrase qualifies words other than its immediate antecedent. This is so for the elementary reason that "a clause modifies that antecedent which the draftsman intended it to modify," regardless whether that antecedent is immediate or distant. *United States* v. *Brandenburg*, 144 F.2d 656, 660-61 (C.A. 3). Accordingly, a counterprinciple to the "last antecedent" rule was recognized in *Porto Rico Ry., Light & Power Co.* v. *Mor*, 253 U.S. 345 ("*Mor*"). Justice Brandeis explained:

> When several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all. [253 U.S. at 348.]

At issue in *Mor* was a jurisdictional provision [15] providing in relevant part:

> Said district court shall have jurisdiction of all controversies where all of the parties * * * are [1] citizens or subjects of a foreign State or States, *or* [2] citizens of a State, Territory, or District of the United States *not domiciled in Porto Rico*, wherein the matter in dispute exceeds, exclusive of interest or cost, the sum or value of $3,000 * * *. [*Id.* at 346, emphasis and bracketed numbers added.]

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*phrase* immediately preceding" (*id.*, emphasis added) leads to two possible results: The qualifying phrase "provided for under the agreement * * *" could be applied either to the immediately preceding *word*—"charges", or to the *phrase* "any reasonable fees, costs, or charges". The former alternative, for which no one contends, is excluded only for reasons extrinsic to the "doctrine".

[14] 2A C. Sands, *Sutherland Statutory Construction* § 47.33 at 245 (4th ed. 1984) (emphasis supplied), cited at U.S. Br. 16.

[15] Section 41 of the Jones Act, March 2, 1917, c. 145, 39 Stat. 951, 965.

The qualifying language construed in *Mor* ("not domiciled in Porto Rico") follows two groupings of possible antecedents *that are connected by a comma and a conjunction.* This language, too, parallels that of § 506(b). The Court held in *Mor*, as it had in *Cherokee Nation*, that the "natural construction" of the language of the statute in question required that the qualifying language modify all antecedents. 253 U.S. at 348. This was deemed to be the natural reading in both cases even though no comma appeared *before* the qualifying phrase—as the government suggests is required, p. 10, n.8, *supra.*

Under the *Mor* approach, the "natural construction" of the parallel language of § 506(b) limits "interest on such claim" to situations where interest is "provided for under the agreement under which such claim arose." But even if this is not the "natural construction," the Court's analysis in *Mor* and *Cherokee Nation* removes any basis for the government's contention that the text of § 506(b) *unambiguously* disallows it.[16]

[16] The government makes two additional arguments which likewise contribute no insight into the "plain meaning" of § 506(b) but, at most, proposed possible *inferences* concerning Congressional intent. U.S. Br. 17-19. Both points are specious.

The government asserts that if it had intended to allow postpetition interest only for consensual liens, "Congress likely would have placed the provision elsewhere", *id.* 18; but no more appropriate placement for the provision is proffered. Moreover, even under the government's proposed construction—that interest is allowed also for nonconsensual liens—the provision would apply only to *oversecured* claims and, therefore, would be equally subject to the objection that "the context in which Section 506(b) appears hardly indicates that the entire subsection was designed to be limited to a particular type of secured claim." *Id.* 17. And since § 506 "concerns the treatment of secured claims in bankruptcy proceedings" (*id.* 3), the placement of the provision in that section is unremarkable. Similarly, since § 506(b) deals with *claims* rather than "lien[s] created by an agreement", the language chosen by Congress is at least as appropriate (we need put it no higher) as some revision which would use the term "security interest", as the government suggests. *Id.* 18.

[Continued]



**II. The Court of Appeals Correctly Concluded That Congress Did Not Change the Well-Settled Principle Which Denies Postpetition Interest on Prepetition Claims Secured by Nonconsensual Liens.**

A. In *Nicholas* v. *United States*, 384 U.S. 678, Justice Stewart stated and explained the general bankruptcy principle which in 1978, when the Bankruptcy Code was enacted, governed postpetition interest on prepetition claims:

> It is a well-settled principle of American bankruptcy law that in cases of ordinary bankruptcy, the accumulation of interest on claims against a bankrupt estate is suspended as of the date the petition in bankruptcy is filed. *Sexton* v. *Dreyfus*, 219 U.S. 339. That rule, grounded in historical considerations of equity and administrative convenience, was specifically made applicable to the accumulation of interest on claims for taxes by the decision of this Court in *New York* v. *Saper*, 336 U.S. 328.
>
> * * * *
>
> We believe that the decisions of this Court in *Sexton* and *Saper* reflect the broad equitable principle that creditors should not be disadvantaged *vis-a-vis* one another by legal delays attributable solely to the time-consuming procedures inherent in the administration of the bankruptcy laws. In the context of interest-bearing debts, the equitable principle enunciated in *Sexton* and *Saper* rests at bottom on an awareness of the inequity that would result if, through the continuing accumulation of interest in the course of subsequent bankruptcy proceedings, obligations bearing relatively high rates of interest

[16] [Continued]

To be sure, if Congress had anticipated the argument that § 506(b) allows nonconsensual lienholders to receive postpetition interest—although no such result was urged during consideration of the bills, see pp. 19-20, *infra*—it might have used different words or different punctuation. Even so, the drafters would have had no assurance that they had avoided ambiguity or excluded all argument that its intent would have been more clearly expressed by some other formulation.

> were permitted to absorb the assets of a bankrupt estate whose funds were already inadequate to pay the principal of the debts owed by the estate. [384 U.S. at 682-684, footnotes omitted.]

See also *Vanston Bondholders Protective Committee* v. *Green*, 329 U.S. 156, 163-164 (*"Vanston Committee"*); *United Savings* v. *Timbers of Inwood Forest*, 108 S.Ct. 626, 631 (Jan. 20, 1988) (*"United Savings"*), quoted at p. 18, n.19, *infra*; and the decision below, Pet. 5a-6a.

As of 1978, this general rule was subject to three exceptions whereby postpetition interest on prepetition secured claims was allowed if: (1) the debtor is proven to be solvent; (2) the property held by the creditor to secure the debt produces income during the course of proceedings; or (3) the value of the collateral securing the debt is sufficient to pay both the claim and postpetition interest on the claim. The first two exceptions had long been recognized under English bankruptcy law and were approved by this Court; see *New York* v. *Saper*, 336 U.S. at 330, n.7, citing *American Iron Co.* v. *Seaboard Air Line*, 233 U.S. 261, 267; *Sexton* v. *Dreyfus*, 219 U.S. at 346. The third exception had been generally widely approved by the Courts of Appeals.[17] This third exception

> was created pursuant to the theory that postpetition interest should be allowed where a security agreement had been voluntarily executed and the creditor had successfully bargained for specific, valuable collateral to secure the principal obligation. Accordingly, where the creditor had bargained to become an oversecured creditor, he had an expectation of

[17] See *e.g.*, *Kagan* v. *Industrial Washing Machine Corp.*, 182 F.2d 139, 146 (C.A. 1); *Eddy* v. *Prudence Bonds Corp.*, 165 F.2d 157, 160 (C.A. 2, L. Hand, J.); *Oppenheimer* v. *Oldham*, 178 F.2d 386 (C.A. 5); *In re Macomb Trailer Coach*, 200 F.2d 611, 613 (C.A. 6); *In re Kerber Packing Co.*, 276 F.2d 245 (C.A. 7); *In re Black Ranches, Inc.*, 362 F.2d 8, 15 (C.A. 8); *United States* v. *Bass*, 271 F.2d 129, 130 (C.A. 9); *In re Deep Rock Oil Corp.*, 113 F.2d 266, 269 (C.A. 10). See also *Vanston Committee*, *supra*, 329 U.S. at 164 (*dictum*).



> receiving interest were it necessary to sell the security. [Pet. 6a-7a.]

However, as the court below also explained:

> It was equally well established by at least four courts of appeals that the third exception—allowing the payment of postpetition interest if the claim was oversecured—did not apply to liens which were nonconsensual in nature, such as tax liens, *because the underlying reason for the exception did not apply.* [Pet. 7a, emphasis added.] [18]

The general principle disallowing postpetition interest is expressly codified in § 502(b)(2), and the first and sec-

[18] The court below cited *In re Kerber Packing Co.*, 276 F.2d 245 (C.A. 7); *United States* v. *Mighell*, 273 F.2d 682, 684 (C.A. 10); *United States* v. *Bass*, 271 F.2d 129 (C.A. 9); *United States* v. *Harrington*, 269 F.2d 719, 724 (C.A. 4).

While acknowledging that the courts had established the principles described in the text, the government objects that *Harrington* "does not truly endorse the distinction between consensual and nonconsensual liens * * *". U.S. Br. 25, n.10. It is true that the *Harrington* court did "not find in the decided cases sufficient support for a third general exception." 269 F.2d at 723. But that court observed that the cases recognized an exception "for mortgagees or holders of other particular collateral" and squarely embraced the distinction between nonconsensual and consensual liens. *Id.* at 724, quoted at p. 26, *infra*. Most to the point, the government cannot deny that *Harrington* refused to allow postpetition interest even where the government has obtained tax liens. *Id.* at 721-722, 724. And *that* is the rule which the government seeks to reverse in this case. See pp. 26-27, *infra*.

The government's criticism of the Court of Appeals' citation of *Mighell* (U.S. Br. 26, n.10) is likewise unwarranted. The Tenth Circuit there expressly rejected the government's contention that *New York* v. *Saper*, *supra*, should be distinguished "on the basis that [in *Mighell*] there was a pre-bankruptcy lien." 273 F.2d at 684. Thus, the court did not, as perhaps it might have, decide *Mighell* solely on the ground that the government had not there relied on any of the three exceptions; instead, the court went further and "agree[d] with" the reasoning of *Harrington* and *Bass*, *supra*, that the presence of tax liens does not justify granting postpetition interest on a tax claim. *Id.*

ond exceptions "were preserved intact" in §§ 726(a)(5) and 552(b) respectively. See *Newbury Cafe*, 841 F.2d at 22. And it is common ground that § 506(b) codifies the third exception as it was applied by the courts to allow postpetition interest to oversecured consensual creditors.[19]

Thus, the only open issue is whether Congress, in that provision, at the same time *changed* the law to allow postpetition interest on oversecured claims where the lien is nonconsensual in origin, although such interest had consistently been disallowed by the courts. Such a change would be sweeping, for it would allow postpetition interest to all holders of oversecured claims—to private nonconsensual lienholders such as judgment creditors and mechanic's lien claimants as well as state and federal revenue collectors. See U.S. Br. 19 and cases cited at *id.* n.7. In order to accept the government's position it must be assumed that Congress overrode the equitable considerations which underlie *Sexton*, *Saper* and *Nicholas* on behalf of these categories of claimants without leaving a trace of evidence that it was dissatisfied with existing law. Indeed, for aught that appears, no group which would benefit from such a reversal proposed that it be accomplished. Significantly, the Commissioner of Inter-

[19] Section 506(b) also implicitly reaffirms the general principle, because to the extent that it permits interest it does so only with respect to certain *oversecured* claims. This Court said in *United Savings*:

> Section 506(b)'s denial of postpetition interest to undersecured creditors merely codified pre-Code bankruptcy law, in which that denial was part of the conscious allocation of reorganization benefits and losses between undersecured and unsecured creditors. "To allow a secured creditor interest where his security was worth less than the value of his debt was thought to be inequitable to unsecured creditors." *Vanston Bondholders Protective Committee* v. *Green*, 329 U.S. 156, 164 (1946). It was considered unfair to allow an undersecured creditor to recover interest from the estate's unencumbered assets before unsecured creditors had recovered any principal. [108 S.Ct. at 631.]



nal Revenue, in extensive comments on the tax aspect of earlier versions, made specific proposals as to what bankruptcy reform legislation should contain, but did not urge that the bills should be revised to allow postpetition interest on federal tax claims, or on claims of nonconsensual lienholders generally.[20]

That Congress did not intend to change existing law in enacting § 506(b) is evidenced also by an important item of legislative history which apparently was not cited to the court below. A "Table of derivation of H.R. 8200" prepared by the House subcommittee states, with respect to § 506(b), that the "Present law" is "*In Re Black Ranches, Inc.* [362 F.2d 8, see p. 16, n.17, *supra.*]"[21] This is a reference to a 1966 Eighth Circuit decision which allowed postpetition interest to an oversecured creditor where the agreement—a note—provided for such interest. On the other hand, where a provision created "New" law, the table so states; so too, where a provision of the

[20] Commissioner Donald C. Alexander submitted identical statements to the House and Senate Committees commenting on bills which were before the 94th Congress; see 6 Leg. Hist. 1943 (Doc. 30), and 11 *id.* at 12 (Doc. 37). None of these bills contained a provision relating to postpetition interest for oversecured creditors, and Mr. Alexander did not recommend that such a provision be included to change the existing law. Indeed, he cited *Nicholas*, *supra*, without apparent disapproval; in this regard, he urged legislation only to deny a tax deduction for unpaid interest to taxpayers who are on an accrual basis:

> The filing of a petition in a chapter [XI] or liquidating proceeding suspends the accumulation of interest on pre-petition debts for purposes of distribution. *Nicholas* v. *United States*, 384 U.S. 678 (1966). However, interest continues to accrue for tax purposes on secured debts even though it is obvious that it will not be paid. Rev. Rul. 70-367, 1970-2 C.B. 37. Although the Service is presently reconsidering Rev. Rul. 70-367 it would nevertheless be desirable to have legislation to the effect that no deduction shall be allowed with respect to interest which accrues during a bankruptcy proceeding on pre-petition debts unless and until such interest is actually paid. [6 Leg. Hist. at 1987-88; 11 *id.* at 49.]

[21] 11 Leg. Hist. (Doc. 40) at 8.

prior Bankruptcy Act was revised, the table says, "Compare with * * * " (citing the pertinent section or sections of the prior Act).[22]

B. Against the background of these well-established principles of bankruptcy law, the question whether § 506(b) is to be construed to allow the government and other nonconsensual lienholders to receive postpetition interest is governed by the rule of construction set forth in *Midlantic National Bank* v. *New Jersey Department of Environmental Protection*, 474 U.S. 494 (*"Midlantic"*):

> * * * [W]hen Congress enacted § 554 [of the Bankruptcy Code], there were well-recognized restrictions on a trustee's abandonment power. In codifying the judicially developed rule of abandonment, Congress also presumably included the established corollary that a trustee could not exercise his abandonment power in violation of certain state and federal laws. The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific. *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256, 266-267 (1979). *The Court has followed this rule with particular care in construing the scope of bankruptcy codifications.* [474 U.S. at 501, emphasis added.]

This rule of construction was followed, and *Midlantic* quoted with approval, in *Kelly* v. *Robinson*, —— U.S. ——, 107 S.Ct. 353, 359-360 (Nov. 12, 1986). It was followed once again last Term in *United Savings*, where the Court reaffirmed that "* * * a major change in the existing rules would not likely have been made without specific provision in the text of the statute, cf. *Kelly* v. *Robinson*, 479 U.S. ——, —— (1987); it is most improbable that it would have been made without even any mention in the legislative history." 108 S.Ct. at 634.

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[22] 11 Leg. Hist. (Doc. 40) *passim*.



The court below correctly understood that *Midlantic* and *Kelly require* that "in order to determine if section 506(b) changed the interpretation of a judicially created rule, we must first understand that rule and its origins." Pet. 5a. Having reviewed the pre-1978 decisions, that court correctly held "that the language of section 506(b), when read in light of the pre-Code judicially created doctrine, codifies the pre-Code law on the issue of allowable postpetition interest." *Id.* 10a.[23]

C. The government asserts, however, that the court below erred in its reliance on *Midlantic* and *Kelly*. U.S. Br. 30-35. In so doing, it misreads first, the opinion below and, more seriously, this Court's decisions in *Midlantic* and *Kelly*.

(1) Contrary to the government's characterization, the court below did not say that *Midlantic* and *Kelly* "establish a general rule requiring explicit statements in the legislative history to enact a new bankruptcy provision that deviates from pre-Code law." U.S. Br. 31. What the Court of Appeals actually said in the passage to which the government there refers is:

> If Congress intended to depart from pre-Code law with respect to only this one portion of section 506(b), particularly when several courts of appeals were unanimous in their interpretation of the Bankruptcy Act, such an intent must be expressed explicitly and not through the ambiguous use of a comma and the words "and any." [Pet. 12a.]

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[23] See also *id.* 12a, quoted in text, this page, and *Newbury Cafe*, *supra*: "In light of the uniform and extensive pre-Code law, [the] void [in the legislative history] is a serious obstacle for [the State Revenue Authority], particularly in a bankruptcy matter." 841 F.2d at 22, quoting *Midlantic*, and approving the reasoning of the court below. We note also that the Fourth Circuit in *In re Best Repair Co.*, 789 F.2d 1080, did not attempt to reconcile its conclusion with the *Midlantic* rule of construction. It may be that *Midlantic* was not called to the Fourth Circuit's attention; that case was decided only 10 days before the argument in *Best Repair*; *Kelly* and *United Savings* were decided *after Best Repair*.

The proposition that any intent to change the pre-Code law "must be expressed explicitly" is an entirely accurate statement of the *Midlantic-Kelly* rule of construction. Of course, Congress can express such an intent "explicitly" without resort to legislative history; it can do so "on the face of a statute". U.S. Br. 31-32, citation omitted. The court below said nothing to the contrary. Rather, it determined that the language and punctuation of § 506(b) are "ambiguous," so that the intent to change does *not* appear "on the face of [the] statute". Accordingly, the Court of Appeals concluded that the "admitted lack of legislative history on this point lends further credence to [its] position." Pet. 11a-12a.[24]

(2) The government attempts to limit *Midlantic* and *Kelly* to "the particular context of those cases", *viz.* "the question of the impact of a general bankruptcy provision on important issues and policies outside the bankruptcy context," which it seeks to contrast with cases where the "issue is a core bankruptcy matter." U.S. Br. 32. See also *id.* 34-35. The government's proffered distinction

[24] In charging that the Court of Appeals "characterized the final statements on the floor of the House and Senate by the managers of the legislation as addressed to the differences between the language of the House and Senate *Reports*" (U.S. Br. 32, n.14, emphasis in original), the government misreads that Court's opinion. The sentence which the brief criticizes, but does not quote, is: "The statements of the committee chairmen only explain why the reference to the attorney's fees was eliminated." Pet. 12a, n.11. These words plainly do not refer to the committee *Reports*. If it is necessary to go further, the context, too, refutes the government's reading. The opening (topic) sentence of the Court's footnote is: "The Senate Report, the House Report, and statements of the chairmen on the responsible subcommittees do not address the language in section 506(b) referring to interest." *Id.* In the remainder of the footnote, the Court described first, what the House and Senate Reports said about the substance of § 506(b), and then (in the above-quoted sentence) the statements of the committee chairmen on the same subject.

In short, the accusation that the court below was "excessively preoccup[ied] with the legislative history" (U.S. Br. 32, n.14) is not merely hypercritical; it is wrong. Cf. *Matthew* 7:3.



is contrary to the reasoning in the *Midlantic* and *Kelly* opinions; fails to take account of *United Savings*, which followed *Kelly* in "a core bankruptcy matter"; and is inconsistent with the government's own position in *Midlantic* itself.

a. The major infirmity of the government's attempt to distinguish *Midlantic* and *Kelly* is that this Court's opinions do not permit the proposed limitation. The Court declared that the "*normal rule of statutory construction* is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific" (citing a case from another field), and then stated that the "Court has followed this rule *with particular care in construing the scope of bankruptcy codifications.*" *Midlantic*, 474 U.S. at 501, and *Kelly*, 107 S.Ct. at 359, emphasis added. This statement that the rule is applicable to legislation generally and with special force to bankruptcy issues, simply will not bear the government's suggested reading that the rule is confined to a particular class of bankruptcy issues. The government's brief does not quote, let alone discuss, the critical portion of the *Midlantic* and *Kelly* opinions which states the rationale which the Court of Appeals followed in this case.[25]

b. The government's attempt to limit the *Midlantic-Kelly* rule of construction to "the particular context of those cases" perforce ignores the fact that that rule was followed also in *United Savings*, 108 S.Ct. at 634, quoted at p. 20, *supra*. The issue in *United Savings* was whether an undersecured creditor is entitled to interest on its collateral during the automatic stay provided by § 362(a) of the Code. The case involved the construction primarily of §§ 361, 362(d) and 506(b) of the Code; it had nothing to do with the relationship between the Code and "policies outside the bankruptcy context." U.S. Br. 32.

[25] This omission is all the more revealing since the government quotes liberally from *other* portions of the *Midlantic* and *Kelly* opinions. U.S. Br. 33-35.

In the government's terms, *United Savings* was "a core bankruptcy matter." *Id.*

c. The government's contention in this case that the rule of construction has only a narrow scope is also contrary to its own submission in *Midlantic*. There, the government asserted, without qualification:

> Congress is, of course, presumed to have codified the judge-made law existing at the time of its consideration and enactment of Section 554. See *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 379-382 (1982); *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978). At the time that Congress considered and enacted Section 554, the trustee's responsibility to exercise his abandonment powers consistent with federal and state police powers was well established.[26]

As the government said, "of course." This rule of construction not only states established precedent but makes eminently good sense. Were it otherwise, every previously decided question of bankruptcy law would become *res nova* whenever Congress engages in a "comprehensive revision of the Nation's bankruptcy laws". U.S. Br. 10. The same would be true with respect to "comprehensive revisions" in other areas of the law. The result would be chaos for the courts, to say nothing of affected parties. Moreover, Congress knows what changes it wants to make, sweeping though they may be, and the inference that it wishes to preserve that which it leaves alone is compelling; indeed, new provisions are normally drafted on the assumption that they will fit into an existing legal framework.

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[26] Brief for the United States as *Amicus Curiae* Supporting Respondents, Nos. 84-801 and 84-805, p. 16. See also *id.* at 15:

> * * * Congress's failure to elaborate on the reach of Section 554 "is most eloquent, for such reticence while contemplating an important and controversial change in existing law is unlikely." *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256, 266-267 (1979) (footnote omitted).



D. The government contends also that Congress could not have intended to codify the principles of the pre-1978 cases. U.S. Br. 26-30. These contentions are uniformly without merit, as we now show.

(1) The government says that "it is something of an exaggeration to characterize [the pre-1978 decisions] as establishing a 'rule' that could appropriately be codified." U.S. Br. 26. We certainly agree that, as a general matter, " 'the touchstone of each decision on allowance of interest in bankruptcy * * * has been a balance of equities between creditor and creditor or between creditors and the debtor' ". *Id.*, quoting *Vanston Committee*, *supra*, 329 U.S. at 165. But whereas the courts sometimes *denied* postpetition interest to a consensual lienholder in light of special circumstances,[27] discretion was not exercised to *grant* such interest to nonconsensual lienholders. Moreover, any suggestion that these equitable principles *could not be codified* defies the reality of what Congress *did* in § 506(b) itself and in the other provisions cited at pp. 17-18, *supra*.

(2) Pointing to "changes in commercial lending practices and in the law governing federal tax liens", the government argues that "to the extent Congress focused its attention at all on the[e] pre-Code distinction [between consensual and nonconsensual liens], it would be expected to have regarded it as a prime candidate for revision, not codification". U.S. Br. 26. Of course, if Congress did *not* "focus[] its attention at all on this pre-Code distinction," the *Midlantic-Kelly* rule of construction compels the conclusion that *no* change in the prior law was intended. Moreover, the force of that rule

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[27] *E.g.*, *In re Magnus Harmonica Corp.*, 262 F.2d 515, 518 (C.A. 3). There, while the claim for interest was within the contract, the secured creditor had made "overcharges against the debtor outside the terms of the contract and it is only because the debtor is precluded from complaining that the trustee is bound by the debtor's inaction." Therefore, "[s]uch equities as [were] apparent favor[ed] the trustee acting for the general creditors as against [the secured creditor]." *Id.*

is not overcome by showing that intervening circumstances *might have* caused Congress to change the prior bankruptcy law. Thus, the entire enterprise at U.S. Br. 26-30 is fundamentally flawed. Moreover, when the changes to which the government points are examined more closely, it is apparent that neither would have provided any reason for Congress to allow postpetition interest to holders of nonconsensual liens.

a. The government's argument builds on the rationale of the pre-Code decisions, which are fairly exemplified by the following paragraph from *United States* v. *Harrington*, cited at U.S. Br. 27 and 28. The court there said:

> The justification for this allowance to mortgagees, etc., would seem to be that when the creditor extended credit, he relied upon the particular security given as collateral to secure both the principal of the debt and interest until payment and, if the collateral is sufficient to pay him, the contract between the parties ought not be abrogated by bankruptcy. This rationale has no application to tax liens. [269 F.2d at 724.]

We begin by underscoring the obvious. The first quoted sentence set forth the reasons why the courts had recognized an exception allowing postpetition interest to oversecured consensual lienholders; the second sentence stated that nonconsensual liens did not come within this rationale and, therefore, were not subject to an exception from the general rule. Thus, *Harrington* makes clear—and this is likewise true of the other cases that state the pre-Code rule—that the "distinction between consensual and nonconsensual liens" was established by a *two-step* process: (1) Certain characteristics of oversecured loans where interest is provided for in the agreement between the borrower and the lender warrant recognition, on behalf of consensual creditors, of a third exception to the general rule that postpetition interest will not be allowed; (2) this rationale is not applicable to tax and other nonconsensual liens, and *therefore* no exception from the



general rule is to be made with respect to claims secured by such liens.[28]

Thus, in seeking to divert analysis to the "distinction between nonconsensual and consensual liens" (U.S. Br. 24-30), the government approaches the issue and the pre-1978 cases from the wrong end. Those decisions began from the "well-settled" principle that postpetition interest is not allowed. To this principle three exceptions were recognized—one in favor of oversecured consensual lienholders. The government's attempt to bring tax liens within the latter exception failed because the rationale for that exception has no application to tax and other nonconsensual liens. A change in practice which "almost completely undermined" that rationale (*id.* 26) might have prompted Congress to repudiate the exception to oversecured consensual lienholders and, *in that way*, to eliminate the "distinction between nonconsensual and consensual liens" (*id.*), but it is wholly illogical to contend, as the government urges, that such a change could in some way have caused Congress to grant an exception for nonconsensual lienholders.

b. Turning specifically to the government's reliance on "changes in commercial lending practices" (*id.*), the heart of the matter is this: It was no part of the courts' rationale for disallowing interest on claims secured by *non-*

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[28] As stated in *Kerber Packing Co.*:

> The broad language of the *Saper* case appears to deny post-bankruptcy interest on all tax claims. We do not believe that the Supreme Court intended the application of the principles set out therein to be restricted to non-liened taxes.
>
> In three recent decisions, * * * the United States contended for post-bankruptcy interest on liened tax claims. Each of these courts rejected the post-bankruptcy interest on liened tax claims. We agree with those decisions.
>
> The application of the exceptions to the allowance of interest on claims subsequent to filing of a petition in bankruptcy or other insolvency proceedings should not be extended by judicial fiat. [276 F.2d at 247-248, citations omitted.]

*consensual* liens that "a lien held by a private *consensual* creditor typically attached to a single asset". U.S. Br. 27, emphasis added. Rather, that disallowance was based on the equitable considerations articulated by this Court in *Sexton*, *Saper* and *Nicholas*. See p. 15, *supra*. Indeed, the government concedes that the courts' view was that "in the absence of such a bargain [for interest], it would be inequitable to award interest at the expense of the unsecured creditors." U.S. Br. 28. These competing equities between unsecured creditors and creditors holding *nonconsensual* liens could not be affected in the slightest by a new lending practice of *consensual* lienholders "to secure their loans by obtaining a lien on virtually every asset owned by the debtor". *Id.* 27. Since the change on which the government relies does not pertain even remotely to the "reasons given in the pre-Code cases" (*id.*) *for denying interest on nonconsensual liens*, the government is entirely unjustified in speculating that the 1978 Congress was prompted by that change to reverse the prior law and allow postpetition interest on such liens.

Conversely, since the courts relied on the prior practice —if at all—only as a reason for allowing postpetition interest to oversecured creditors holding *consensual* liens, a change in the practices of such creditors could, at most, have induced Congress to deny interest to holders of consensual liens generally (or to those who attached more than a single asset). Congress instead chose to codify that exception, perhaps because it believed, as had the courts, that it is desirable to give private creditors the benefit of their bargain for interest.[29] In any event, since the change in practice affected, at most, the rationale for allowing

[29] For aught that appears, Congress was advertent only to changes in the practices of creditors lending money to *consumer* debtors, for these alone were referred to in the House Report cited at U.S. Br. 27. Congress addressed that matter *directly* by enabling individual debtors to avoid liens on certain personal property, including household goods, as specified in § 522(f)(2) of the Code, cited *id.* at n.11.



interest secured by *consensual* liens (where the underlying agreement provided for interest), it is wholly illogical to argue from that change that Congress altered the law with respect to *nonconsensual* liens, such as those for taxes, or on judgments.

c. The further point—based on a supposed shift in the balance of equities between private and nonprivate secured creditors due to the Federal Tax Lien Act of 1966, which makes it more probable that private creditors will receive notice of federal tax liens (U.S. Br. 28)—is wholly implausible. To begin with, there was nothing in the cases which recognized the third exception or, more to the point, in those which denied postpetition interest to tax collectors and other holders of nonconsensual liens, that even remotely related to the pre-1966 law with respect to notice of federal tax liens. Furthermore, and most significantly, whereas the 1966 change dealt only with *federal tax* liens, the proposed change in the bankruptcy law would aid not only the federal tax collectors but also state revenue authorities and private nonconsensual lienholders. See p. 18, *supra*. On the other side of the balance, the unsecured creditors who are protected by the pre-Code law (see p. 15, *supra*), benefit rarely, if ever, from the change-in-notice requirements effectuated by the 1966 Act. The major beneficiaries of those changes are prospective lenders who, having notice of federal tax liens, choose *not* to extend credit, or to assure themselves that the borrower has sufficient assets so that the loan can be sure despite the federal tax lien.

The two additional points made at U.S. Br. 28-29 likewise assert equitable considerations which affect only the federal government, and therefore could not possibly justify a construction of § 506(b) granting postpetition interest to oversecured nonconsensual creditors generally. Moreover, neither point has substance even as to the federal government.

The concern that "the government is, in important respects, less able to protect its position than a private

creditor" (*id.* 28, citing H.R. Rep. 95-595 at 189-193), was dealt with by Congress *directly* in provisions of the new Code which deal with the priority nondischargeability of income taxes, as the House Report there explains.

Finally, the taxing authorities could have expressed *to Congress* their disagreement with the pre-1978 decisions which allowed interest to private creditors but not to the government. U.S. Br. 29. But since they did not do so, it is unreasonable to suppose that Congress would have reversed the prior law to favor nonconsensual lienholders on its own initiative. See pp. 19-20, *supra*. Under these circumstances, common sense reinforces the *Midlantic-Kelly* rule that an intent to change the law will not be attributed to Congress unless "it makes that intent specific." 474 U.S. at 501.

## CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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No. 87-1043

# In the Supreme Court of the United States

OCTOBER TERM, 1988

UNITED STATES OF AMERICA, PETITIONER

*v.*

RON PAIR ENTERPRISES, INC.

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## REPLY BRIEF FOR THE UNITED STATES

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## REPLY BRIEF FOR THE UNITED STATES

Section 506(b) of the Bankruptcy Code, 11 U.S.C. (Supp. IV) 506(b), provides that the holder of an oversecured claim is entitled to receive "interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose." The natural, common-sense reading of this provision is that post-petition interest may be received by the holder of *any* oversecured claim, contrary to the decision below that the statute should be construed to restrict the recovery of interest only to the holders of liens created by agreement, *i.e.*, consensual liens. As we explained in our opening brief (at 14-19), the language of the statute, its grammatical structure (including the ordering of the phrases and its punctuation), and its context all support the natural import of its text, namely, that the holders of oversecured claims are entitled to post-petition interest, regardless of the source of the secured claim. This plain meaning of the statutory text should control unless there is a strong basis

for believing that it does not reflect congressional intent. See, *e.g., Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982). As we further explained in our opening brief (at 20-37), there is no indication that Congress here intended to create a rule different from that established by the plain language and therefore no basis for departing from the statutory text.

Respondent advances no evidence showing that Congress did not intend the plain import of the statutory language to govern the receipt of post-petition interest. Nor does respondent assert that there is any logical reason that would have motivated Congress to draw a distinction, for post-petition interest purposes, between the holders of oversecured claims that were established by agreement and the holders of other oversecured claims. Instead, respondent argues that the apparent meaning of Section 506(b)—making interest available to the holder of any oversecured claim—should be disregarded because, according to respondent, that interpretation rests only on "punctuation, in particular the placement of two commas, which at best are unnecessary and at worst ungrammatical" (Resp. Br. 12). Respondent asserts that, if these commas are deleted, Section 506(b) could be naturally read to limit interest recovery to the holders of oversecured claims arising from consensual liens (Resp. Br. 12-13). Respondent then concludes that, "[i]n the face of the confusing commas, § 506(b)'s ambiguity, and the absence of any indication whatsoever that Congress intended, considered, or even contemplated changing the case law which preceded enactment of § 506(b)," the pre-Code court of appeals cases that recognized a distinction between consensual and nonconsensual liens "should continue to govern" (Resp. Br. 16). See also Amicus Br. 3-4, 10-11.



Respondent's approach totally inverts the correct method of determining the meaning of a statutory rule. When Congress addresses a particular issue by means of a specific statute, prior judge-made law does not "continue to govern"; it is the statute that governs and supersedes prior law. Even if the text of a statute arguably can support more than one interpretation, that is not a reason to abandon the statute and revert to prior judge-made law; rather, the statute still must be construed and applied. And the basic source for determining the meaning of the statute and of the congressional intent in enacting it is the statutory text—the "literal or usual meaning of its words." See *Trans Alaska Pipeline Rate Cases,* 436 U.S. 631, 642 (1978); *Commissioner* v. *Brown,* 380 U.S. 563, 571 (1965). That meaning should be followed unless there is a strong reason for doubting that it reflects the intent of Congress—for example, if it produces an absurd result, renders the statute internally contradictory, or diverges from an intent that is clearly expressed in the legislative history. See, *e.g., United States* v. *Turkette,* 452 U.S. 576, 580 (1981); *Trans Alaska Pipeline Rate Cases,* 436 U.S. at 643. Thus, contrary to respondent's assertion and the court of appeals' reasoning (see Resp. Br. 16-17; Pet. App. 11a-12a), there is no need to look for an indication elsewhere that Congress meant what is said in the text of the statute; rather, in order to justify a departure from the apparent meaning of the words, it is incumbent upon respondent to show that that apparent meaning is "demonstrably at odds with the intentions of its drafters" (*Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. at 571). Clearly, respondent has not carried that burden.

1. Respondent's discussion of the text of the governing statute (Br. 12-17) is confined to what it terms "the punctuation problem" (Br. 12; see also Amicus Br. 10-12).

Respondent asserts that the government's argument rests entirely on the punctuation of Section 506(b), and it then rejects that argument on the ground that punctuation is an unreliable guide to the interpretation of statutes (Br. 12). First, the premise of respondent's discussion is incorrect. As we explain in our opening brief (at 14-19), the punctuation of Section 506(b) is only one of several identifiable features of the provision indicating that its natural meaning is to make post-petition interest available to the holder of any oversecured claim. Section 506 is the general provision of the Bankruptcy Code dealing with secured claims, and its other subsections all apply to every kind of secured claim, including those arising from tax or other kinds of nonconsensual liens; it is incongruous to read Section 506(b) as not applying at all to secured claims arising from nonconsensual liens (U.S. Br. 17-18). The modifying clause upon which respondent relies—"provided for under the agreement under which such claim arose"—is placed where it ordinarily would not be construed to modify the allowance of interest (U.S. Br 15-17).[1] And the language

[1] Amicus invokes (Br. 8-10) an earlier version of Section 506(b) in an attempt to show that the "provided for under the agreement" clause modifies "interest," even though Congress placed it at the end of the subsection where it ordinarily would be regarded as modifying only the last antecedent (Amicus Br. 8). This legislative history, however, lends no logical support to amicus's conclusion. The assertion that this earlier version (*ibid.*) contained an additional modifying clause ("to the extent collectible under applicable law") that the drafters designed to apply both to interest and to other costs, fees, and charges provides no logical basis for concluding that the "provided for" clause, inserted in a different place in the statute, also was designed to modify both interest and other costs, fees, and charges. To the contrary, as we noted in our opening brief (at 23-24 n.9), to the extent this earlier version of the statute is probative at all, it shows that the drafters of Section 506(b) knew how to design a clause so that it modifies both interest and other costs, fees, and charges, if they so desired.



of the modifying clause is ill-suited to the purpose ascribed to it by respondent and the court of appeals. The phrase appears designed to identify other types of charges that will be allowed, *i.e.*, those specified in the agreement, but it does not address the type of lien involved; that would most logically have been accomplished by using the Bankruptcy Code's term of art for a consensual lien—a "security interest" (11 U.S.C. (Supp. IV) 101(45)) (U.S. Br. 18-19).[2] Thus, contrary to respondent's assertion (Br. 12), a mere change in the comma structure of Section 506(b) would not transform the provision into one that plainly establishes a distinction between consensual and nonconsensual liens.[3]

[2] Amicus objects to this point on the ground that, since Section 506(b) speaks in terms of claims, rather than liens, it would not have been logical for Congress to have used the term "security interest" (see Amicus Br. 14 n.16). That objection is unconvincing since Congress did use the phrase "secured only by a security interest" in 11 U.S.C. (Supp. IV) 1322(b)(2), which is a provision dealing with secured claims under a wage earner's plan, when it wanted to distinguish between the claims of the holders of consensual liens and those of the holders of nonconsensual liens.

[3] Amicus responds individually to each of our points on this issue (see Br. 9 n.6, 10-12, 12-13, 14 n.6), characterizing some as not probative and others as merely providing an "*aid* to" (Br. 13 (emphasis in original)) or "*inference* concerning" (Br. 10 n.6 (emphasis in original)) congressional intent that cannot establish the "plain meaning" of the statute. Like respondent's argument concerning commas, however, this attempt to divide and conquer is fundamentally misconceived. No particular component of a statutory provision is necessarily conclusive of its meaning, especially if it runs counter to other evidence of congressional intent. But the aggregate of the factors discussed in our opening brief is what yields the natural meaning of a statute. If a statutory provision has a common sense meaning that is supported by these factors, the provision has a plain meaning that should not be disregarded in the absence of strong contrary evidence of congressional intent. After all, if, as amicus apparently maintains, the words used in a statute, their order, the punctuation, and the context cannot

Second, the fact that the placement of commas or other punctuation is not generally a conclusive indicator of legislative intent does not mean that the punctuation chosen by Congress should be ignored. Since punctuation is used in legislation, as in other forms of written expression, to group words to convey a particular meaning, it should be presumed to have been used intentionally by Congress when it produces a reading of the statute that makes sense in the particular legislative context. To be sure, this Court has on a few occasions given a statute an interpretation that does not accord with what would be indicated by the punctuation. See, *e.g.*, *Simpson* v. *United States,* 435 U.S. 6, 11 n.6 (1978); *Porto Rico Ry. Light & Power Co.* v. *Mor,* 253 U.S. 345 (1920); *Stephens* v. *Cherokee Nation,* 174 U.S. 445 (1899). In each of those cases, however, the Court examined the context of the provision and concluded that the reading suggested by the punctuation made little sense and did not reflect congressional intent. See *Simpson,* 435 U.S. at 12 n.6; *Mor,* 253 U.S. at 348-349; *Cherokee Nation,* 174 U.S. at 480-481. These holdings are simply applications of the general principle that the natural or literal reading of a statute need not be followed if it would lead to " 'absurd results . . . or would thwart the obvious purpose of the statute' " (*Trans Alaska Pipeline Rate Cases*, 436 U.S. at 643 (quoting *Commissioner* v. *Brown*, 380 U.S. at 571)). In this case, by contrast, the punctuation and several other factors all indicate that post-petition interest may be received by the holder of any oversecured claim,[4] and that reading is *not*

be invoked to establish the meaning of the statute, there is little left with which to divine its meaning and therefore equally little left of the principle that the statutory text is the touchstone for determining congressional intent.

[4] There can be little doubt that the punctuation supplied by Congress in Section 506(b) does suggest that post-petition interest is



illogical or inconsistent with the purposes of the statute or the evident intent of Congress; to the contrary, it is the interpretation advanced by respondent that leads to the more anomalous result (see point 3, *infra*). Accordingly, there is no reason to ignore the punctuation supplied by Congress and depart from the natural reading of the statute.

To the extent respondent makes any affirmative argument that the statute should be read to support its interpretation, the argument rests entirely on the assumption that Congress intended to codify pre-Code decisional law. Starting with that assumption, respondent concludes that Section 506(b) was carelessly drafted and that two commas should be deleted in order to make the provision grammatically correct (Br. 13; see also Amicus Br. 10-11).[5] If

available to the holders of both consensual and nonsensual liens. In both *Simpson* and *Cherokee Nation*, this Court expressly acknowledged that the punctuation pointed to a different interpretation from the one the Court held to reflect the legislative intent. See 435 U.S. at 11-12 n.6; 174 U.S. at 480. Respondent makes the same admission here, stating that two commas must be deleted in order to make Section 506(b) "gramatically [*sic*] correct" under respondent's interpretation (Br. 13).

[5] If it were truly careless drafting and erroneous punctuation that caused the text of Section 506(b) to make post-petition interest available to the holder of any oversecured claim, there is reason to believe that Congress would have corrected the error. In 1984, Congress made many miscellaneous technical, stylistic, and clarifying amendments to the Bankruptcy Code. See Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, §§ 421-534, 98 Stat. 367-390. These changes included a stylistic change to Section 506(b) itself, inserting the word "for" in the final phrase. See Section 448(a), 98 Stat. 374; U.S. Br. 14 n.2. Congress also amended other sections in response to bankruptcy court decisions that were regarded as misconstruing congressional intent. See Section 317, 98 Stat. 356 ("good faith" standard of Section 1325(a)(3) distinct from question of debtor's ability to pay), discussed in 5 *Collier on Bankruptcy* ¶ 1325.04, at 1325-13 to 1325-13 to 1325-15 (L. King 15th ed. 1988);

one begins by examining the statutory text without making such an assumption, however, it is apparent that a drafter seeking to codify pre-Code decisional law could be expected to have used language very different from that chosen by Congess in Section 506(b). The provision as enacted contains a "provided for in the agreement" phrase that limits the types of costs or fees that can be recovered by the holder of an oversecured claim. Even if this phrase can reasonably be construed to modify the allowance of interest, which we dispute, the statute still would not track the pre-Code decisional law that respondent contends was intended to be codified. The cases on which respondent relies drew a distinction based on the method under which the security was obtained, *i.e.*, between consensual and nonconsensual liens; but they did not hold that it was necessary to look to the agreement to determine whether it specifically provided for interest. It would have been easy enough for Congress to have drafted Section 506(b) to codify those decisions beyond any doubt, simply by restricting the availability of post-petition interest to the

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Section 316, 98 Stat. 356 (codebtor claims can be classified separately under Section 1322(b)(1)), discussed in S. Rep. 98-65, 98th Cong., 1st Sess. 17-18 (1983); see also Section 307(b), 98 Stat. 354 (attorney's fee recovery under Section 523(d) limited to cases where creditor's position not "substantially justified"), discussed in S. Rep. 98-65, *supra*, at 9-10. In 1986, Congress also made numerous technical corrections to the Bankruptcy Code. See Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, § 283, 100 Stat. 3116. Although there were several bankruptcy court decisions that had already been held prior to the enactment of the 1984 legislation that post-petition interest was available to the holder of an oversecured claim based on a nonconsensual lien (see cases cited at U.S. Br. 19-20 n.7), and the Fourth Circuit had decided *Best Repair Co.* v. *United States*, 789 F.2d 1080 (1986), prior to the enactment of the 1986 Act, Congress took no steps to amend Section 506(b) to repair what respondent suggests was careless drafting.



holders of liens obtained by an agreement, a "security interest" in the Bankruptcy Code's lexicon (see U.S. Br. 18; page 5, *supra*). The fact that the drafters did not do this and instead used a phrase that modifies the types of costs that are recoverable strongly militates against finding that Congress intended to codify the pre-Code distinction between consensual and nonconsensual liens, even if Section 506(b) could conceivably be repunctuated and construed to support that conclusion.

Moreover, apart from the question of the availability of post-petition interest to the holders of nonconsensual liens, it is apparent that Section 506(b) does more than codify pre-Code decisional law. As we noted in our opening brief (at 35-36 n.15), the treatment of attorney's fees plainly departs from prior law to the extent that recovery is no longer subject to the vagaries of state law. And, with respect to interest, the pre-Code law relied upon by respondent suggested that the recovery of post-petition interest by the holder of a consensual lien was governed by the equitable considerations of the particular case. See U.S. Br. 26; Amicus Br. 25 & n.27; *In re Boston & Maine Corp.*, 719 F.2d 493, 496 (1st Cir. 1983), cert. denied, 466 U.S. 938 (1984). This equitable inquiry clearly has not survived the enactment of the Bankruptcy Code since, to the extent Section 506(b) allows post-petition interest to the holder of an oversecured claim, it does so categorically. If Section 506(b) as a whole does not codify pre-Code law, there is no reason to assume that it codified the pre-Code distinction between consensual and nonconsensual liens, when the statutory language does not draw such a distinction. In sum, the natural meaning of Section 506(b) is to allow post-petition interest to the holder of any type of oversecured claim, and only strong evidence of a contrary congressional intent would justify a departure from that reading.

2. The mere fact that the natural reading of Section 506(b) establishes a rule different from that adopted by some courts of appeals prior to the enactment of the Code does not provide a sufficient reason for disregarding the statutory text. And, contrary to the contentions of respondent (Br. 20-21) and amicus (Br. 20-24), there is no rule of construction to be derived from this Court's decisions in *Kelly* v. *Robinson*, 479 U.S. 36 (1986), and *Midlantic Nat'l Bank* v. *New Jersey Dep't of Envt'l Protection*, 474 U.S. 494 (1986), that requires Section 506(b) to be construed as a codification of prior judge-made law. See U.S. Br. 30-37. As we explained in our opening brief (at 31-32), those decisions do not suggest that there must be some explicit indication outside the statutory text to justify departing from a prior judge-made rule; such an approach would largely swallow the bedrock principle that the primary guide to congressional intent is the text of the statute itself. Indeed, this Court's recent decision in *United Savings Ass'n* v. *Timbers of Inwood Forest Associates, Ltd.*, No. 86-1602 (Jan. 20, 1988), slip op. 13, adverts to *Kelly* and states that a "specific provision in the text of the statute" can demonstrate congressional intent to effect a major change in existing rules. Here, the "explicit" evidence of congressional intent to enact a rule that differs from pre-Code decisional law is provided in the plain terms of Section 506(b).

What *Kelly* and *Midlantic* do suggest is that the existence of prior case law that is at odds with the literal meaning of a statute necessitates caution in following that literal meaning; when there are strong reasons for believing that Congress did not intend to disturb the prior law, that circumstance can provide a basis for departing from the interpretation indicated by the text of the statute standing alone.[6] The Court's conclusion in both *Kelly* and

[6] Respondent (Br. 21) and Amicus (Br. 24) erroneously assert that the government in its brief in *Midlantic* took a position inconsistent with its position here, allegedly arguing that pre-Code law generally should be presumed to be codified in the Code. In fact, the government's argument in *Midlantic* was much narrower and entirely consistent with its position here. In *Midlantic*, the Code provision at issue had been derived from a Bankruptcy Rule that had codified a principle developed in the case law. In arguing that the Code provision incorporated the case law that had been codified in the Rule, the government's brief (at 16) relied upon *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 378-382 (1982), and *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978), for the fairly well-settled proposition that when Congress adopts a new law that incorporates a provision from an old statute, it is presumed to have adopted the existing judicial and administrative interpretations of that provision. That rule of construction simply reflects the fact that certain language can come to be understood to have a particular meaning when used by legislators, even if that meaning is not obvious when the language is examined in isolation. See, *e.g.*, *United States* v. *Wells Fargo Bank*, No. 86-1521 (Mar. 23, 1988), slip op. 4-5 (phrase "exempt from all taxation" was understood not to create an estate tax exemption). The argument made in the government's brief in *Midlantic* is entirely inapposite here where Section 506(b) did not adopt language used in a prior statute or rule (and, indeed, was a new provision designed to address for the first time by statute an area previously governed by judge-made rules).



*Midlantic* that Congress there did not intend to disturb prior decisional law in no way indicates that the same conclusion is appropriate here. In those cases, the statute (again dealing with bankruptcy) was not addressed to the (nonbankruptcy) subject of the prior judge-made rule at issue and hence there was reason to doubt that Congress had focused its attention on the result indicated by the plain meaning. Moreover, there were strong policy reasons for retaining the prior rule, and there were other indications that Congress would not have wanted to alter the preexisting rule. Hence, the Court found it sufficiently unlikely that Congress had intended to change the prior law that it concluded the statute should not be construed to do so. See U.S. Br. 32-35. This case is very different.

Here, the bankruptcy statute is directed to the same subject as the prior judge-made law at issue and there is accordingly every reason to believe that Congress was aware of the consequences of the plain meaning of its words. There is, moreover, no discernible policy or other reason for believing that Congress would have wanted to retain the old rule. In these circumstances, *Midlantic* and *Kelly* do not suggest that the statutory language here should be stretched to retain prior law.[7]

3. In our opening brief (at 20-21, 27-30), we also explained that there is no sound policy reason for the distinction between consensual and nonconsensual liens that the court of appeals has imported into Section 506(b). In particular, we noted that the justifications that had been advanced by the courts of appeals in the pre-Code cases for this distinction were no longer viable because of changes in the law and in commercial practices. Amicus argues (Br. 25-30) that these changes are irrelevant because they point to the conclusion that Congress should not have allowed post-petition interest to any holder of an oversecured claim, but do not suggest that interest should be allowed to holders of nonconsensual liens. But that objection is

[7] Amicus argues (Br. 23-24) that this Court's decision in *United Savings Ass'n* v. *Timbers of Inwood Forest Associates, Ltd., supra*, which involved a core bankruptcy matter, indicates that the fact that *Kelly* and *Midlantic* involved important nonbankruptcy matters was immaterial to the decisions in those cases. Plainly, *United Savings* demonstrates nothing of the kind. In *United Savings*, the Court relied on the "plain textual indication" in concluding that Congress had not changed the pre-Code rule that an undersecured creditor does not receive post-petition interest, noting (with a cf. citation to *Kelly*) that such a change "would not likely have been made without specific provision in the text of the statute" (slip op. 13). The Court's conclusion that the text of the statute governed in *United Savings* manifestly does not support respondent's argument that the text of the statute should be discarded here in favor of adherence to pre-Code law.



beside the point. It is undeniable that Congress decided in Section 506(b) to allow a holder of an oversecured claim to receive post-petition interest. The only question here is whether that right should be extended to the holder of any oversecured claim or whether it should be restricted to the holders of consensual liens, as some pre-Code court of appeals decisions had held. Respondent and amicus do not dispute that the only reasons advanced by those courts to justify the distinction are no longer viable, and they do not offer any other justification. Thus, it is clear that considerations of policy and logic provide no basis for departing from the natural meaning of Section 506(b) on the theory that Congress intended to retain the distinction made in pre-Code decisional law.

Moreover, the intepretation urged by respondent and adopted by the court of appeals creates an anomaly in the structure of Section 506 that militates against construing Section 506(b) to draw a distinction between consensual and nonconsensual liens. Under Section 506(d)(2), when a secured creditor does not file a proof of claim in the bankruptcy proceeding (and no one files on his behalf), his lien survives; thus, Section 506(d) "permits liens to pass through the bankruptcy case unaffected" (H.R. Rep. 95-595, 95th Cong., 1st Sess. 357 (1977)). The effect of the provision is "to put the secured creditor who chooses to pursue his rights in bankruptcy in the same position that he would occupy if he had decided to bypass bankruptcy" (*In re Lindsey*, 823 F.2d 189, 191 (7th Cir. 1987)). See also, *e.g.*, *Estate of Lellock* v. *Prudential Ins. Co.*, 811 F.2d 186, 188 (3d Cir. 1987); *Chandler Bank* v. *Ray*, 804 F.2d 577, 579 (10th Cir. 1986); S. Rep. 98-65, 98th Cong., 1st Sess. 10 (1983).

Under respondent's proffered interpretation, this framework is disturbed because the holder of an oversecured claim that arises from a nonconsensual lien

will not occupy the same position in the bankruptcy proceeding that he would if he did not participate in the proceeding. In the latter case, he could foreclose on the collateral and receive the full value of the debt, including interest, but in the bankruptcy proceeding he would not be permitted to recover post-petition interest. Respondent's reading of the statute therefore would create an incentive for the holders of nonconsensual liens, such as tax liens or mechanic's liens, to bypass the bankruptcy proceeding and avoid the restriction on recovering interest from the collateral securing their claims. There is no reason to believe that Congress intended to create such an incentive to bypass bankruptcy, which could hamper the orderly handling of bankrupty estates. See H.R. Rep. 95-595, *supra*, at 181. Accordingly, the general policies underlying Section 506 also support the conclusion that Congress intended to enact the rule reflected in the plain meaning of Section 506(b), not to codify some prior judge-made law.

For the foregoing reasons, and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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